IMPACT OF WAR TRIALS ON SUBJECTAL STATUS OF THE INDIVIDUAL

DISSERTATION
SUBMITTED FOR THE DEGREE OF
Master of Philosophy
IN
Political Science

BY
Arun K. Majumdar

SUPERVISOR
Dr. Ishtiaq Ahmad

DEPARTMENT OF POLITICAL SCIENCE
ALIGARH MUSLIM UNIVERSITY
ALIGARH
1979

PREFACE

The subjectal status of individual in International Law is highly controversial. But the War Trials, especially the two Major War Trials held at Nuremberg and Tokyo after the Second World War have, to a great extent, established the fact that individuals are also subjects of the Law of Nations. This Principle evolved from the War Trials, however, has been criticised by eminent authors on various grounds. Several arguments are put forth to deny individual liability under International Law, such as, Acts of State, Superior Orders, *nullum crimen sine lege*, military necessity, *tu quoque*, and the like. Inspite of this, the War Trials have squarely refuted the positivist contention that States are the only subject of International Law.

Furthermore, the main purpose of this study is to determine the impact of War Trials on the subjectal status of individual in International Law. Hence, this study has become inevitably lengthy as it was unavoidable to discuss in detail the various War Trials. Certain War Trials, both ancient and recent, have been discussed in Chapter I of this work. Special attention has been paid to the two "International" Trials cited above. In Chapter II, various crimes, charges, and their legal bases, have been discussed. Chapter III analyses different defence pleas against

individual's subjectal status. Chapter IV cites the Judgments of various War Trials, with emphasis on Nuremberg and Tokyo Trials, and attempts to show their impact on the subjectal status of the Individual. The last chapter concludes the extent to which the War Trials have established the subjectal status of individual in International Law.

For the completion of this work, I am greatly indebted to Dr. Ishtiaq Ahmad, who has supervised the entire project right from its beginning. It is due to his able guidance, constant encouragement and unhesitant help, the work could be completed. I am also grateful to Professor S.A.H. Haqqi, Head of the Department of Political Science, A.M.U., for the keen interest he has shown in my research work and for the valuable and helpful suggestions he has given to me. My gratitude to him is unbounded. I am equally grateful to Professor S. Nasir Ali of Political Science Department for his concrete and enlightened suggestions on the topic.

I am thankful to my friends, colleagues, and teachers for their kind help and encouragement. Moreover, I express my appreciation of the patience and cooperation shown by my wife and children at the time of completion of this work. I am thankful to Mr. Abdul Aleem Ansari for his careful and precise typing of this work. I am also thankful to Mr. Mahboob Beg.

The completion of this work was made possible through the financial assistance of the University Grants Commission, New Delhi, under Teachers Fellowship Scheme of the Faculty Improvement Programme. I am, indeed, indebted to all the concerned authorities.

Arun K. Majumdar

ALIGARH
ARUN K. MAJUMDAR

February 1979

CONTENTS

CHAPTER I

WAR CRIMES AND WAR TRIALS IN INTERNATIONAL LAW

War crimes trials have been highly controversial and complex issue in international law. This is mostly due to the existing imperfections of the institution of war itself and of the international Organisation including the absence of a competent International Criminal Court.[1]

Several war crimes trials have occurred in world history since the antiquity. But the most important trials were held at Nuremberg and Tokyo after the Second World War. All these trials, however, raised much doctrinal controversy regarding the legal basis of trials; composition and jurisdiction of the tribunals to try war criminals. Moreover, the judgments of these tribunals have been criticised on various grounds.

War, till the twentieth century, was regarded as a means of redress. In those days international law as taught, generally declared that war-making was not illegal and no crime at law. The concepts of Jus ad Bellum or 'law into war' and bellum justum or 'just war' were common during these days. Grotius, the father of international

---

1. Oppenheim, L., International Law, (Edited by H. Lauterpacht), Vol. II, 7th Ed., para 257c, p. 586.

law, however, maintained a distinction between the just and the unjust war. All these were in contrast to the twentieth century idea that peace is the way to a new epoch. The concept of Jus contra Bellum or law against war has been recognised by various writers, and enunciated in various treaties and declarations. The principle that resort to war is illegal, except in a number of specified cases, has widely been accepted now. War has been renounced as an 'instrument of national policy'.

Another new juridical discipline which has been brought more sharply into focus after the Second World War, is the existence of 'international criminal law'. The new law has for its object the repression of acts violating the fundamental interests of the moral and material order for which the establishment of peaceful relations between members of the international community calls. Different meanings are ascribed to international criminal law. It may be "identified with the territorial scope of municipal criminal law. It may be equated with internationally authorised municipal criminal law. It may mean municipal criminal law common to civilised nations. It may signify international cooperation in the administration of municipal criminal law, and finally, stand for international criminal law in the material sense of the term."[2]

2. Schwargenberger, G., International Law, London,(3rd ed.), 1957, Vol.II, p. 455.

A crime in international law is "an act which injures not only the state against which it is directed, but the whole international community".[3] Those are acts "of such nature that the security of all states would be imperilled by them".[4] It is true that each and every violation of law can not be a punishable crime; some of them may be illegal acts.[5] Furthermore, "crimes against international law are committed by men, not by abstract entities" [6] warrants further definition of crime in international law. According to Quincy Wright, "A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act, will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state." [7]

---

3. Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens and Sons Ltd., London, 1960, p. 109.

4. Ibid.

5. Kelsen, Hans., Peace Through Law, 1944, p. 116.

6. The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1948, Vol. XXII, p. 466.

7. Wright, Quincy, "The Law of the Nuremberg Trial", The American Journal of International Law, Vol. 41, 1947, pp. 55-56.

The concept of delicti juris gentium or offences against the law of nations is not a new one. The classical text writers on international law recognized it and further it has been employed in national constitutions and statutes. It was regarded as sufficiently tangible in the eighteenth century. The United States Constitution of 1789 empowered Congress to define and punish "piracies and felonies committed on the high seas, and offences against the law of Nations."[8] Thus 'piracy' is an indictable offence in America. Similarly, numerous treaties also contain condemnations of the anti-social conduct of individuals, and the states parties agree to adapt their national penal laws to serve common ends. In some cases the provisions of such treaties are cast in terms which seem to apply directly to individuals. For example, a convention of 1884 provides that the wilful breaking of a submarine cable "shall be punishable offence;" a convention of 1929 provides that certain acts in connexion with the counterfeiting of currency "should be punishable as ordinary crimes."[9]

---

8. Hudson, Manley O., International Tribunals, Past and Future, Carnegie Endowment for International Peace and Brookings Institution, Washington, 1944, para 3, p. 181.

9. Ibid., para 6, p. 182.

It is clear, therefore, that as a general rule piracy, destruction of submarine cables, counterfeiting of currency, trades in slaves, women, children, narcotics and pornographic literature are treated to be crimes under customary international law. Individuals committing any of those crimes can be held criminally responsible under conventional international law. Individual criminal responsibility - a tenet of Natural Law Philosophy, is a growing trend in modern international law.[10]

The legal positivists, however, have challanged the growing trend of individual criminal responsibility. The positivist doctrine which resulted in a set-back of the concept of offences against the law of nations, developed in the nineteenth century. According to this doctrine, only States are subjects of international law and the individuals are bound only by the municipal law of States with jurisdiction over them. This idea, however, has acquired renewed vigour in the twentieth century and has been discussed by numerous text-writers and in many

---

10. Bosch, William J., Judgment on Nuremberg: American Attitudes Towards the Major German War-Crime Trials, Chapel Hill, The University of North Carolina Press, 1970, p. 236.

international conferences. There is, therefore, still disagreement as to the scope of offences against the law of nations. Hudson observed that "If international law can be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal Law".[11]

There is, however, little doubt regarding the right of a belligerent to punish, during the war, such war criminals as fall into his hands. This is a well-recognized principle of International Law.[12] The question, therefore, arises that what constitutes war crimes? Defining war crimes, Oppenheim states: "war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."[13] Furthermore, Oppenheim observes that war crimes "include acts contrary to International Law perpetrated in violation of the law of the criminal's own State, such as killing or plunder for satisfying private lust and gain, as well as criminal acts contrary to the laws of war committed by order and on behalf of the enemy State. To that extent the notion of war crimes is based on the view that States and their organs are subjects to criminal responsibility under International Law."[14]

---

11. Hudsom, op. cit., para 3, p. 181.
12. Oppenheim, op.cit., Vol.II, para 257e, p. 587.
13. Oppenheim, op. cit., Vol. II, para 251, p. 566.
14. Ibid., p. 567.

Generally there are four different kinds of war crimes. Those are, (1) violations of recognized rules regarding warfare committed by members of the armed forces, (2) all hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason, (4) all marauding acts.[15]

Although it is difficult to make an exhaustive list of war crimes due to the complexities of war, Oppenheim has listed some of the important violations of rules of warfare as follows :

"(1) Making use of poisoned, or otherwise forbidden, arms and ammunition, including asphyxiating, poisonous, and similar gases; (2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered; (3) Assassination, and hiring of assassins; (4) Treacherous request for quarter, or treacherous feigning of sickness and wounds; (5) Ill-treatment of prisoners of war, or of the wounded and sick. Appropriation of such of their money and valuables as are not public property; (6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging. Compelling the population of occupied territory to furnish

---

15. Ibid., para 252, p. 567.

information about the army of the other belligerent, or about his means of defence; (7) Disgraceful treatment of dead bodies on battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property or arms, ammunition, and the like; (8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like; (9) Assault, siege, and bombardment of undefended places by naval forces. Aerial bombardment for the sole purpose of terrorising or attacking the civilian population; (10)Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity as are indicated by particular signs notified to the besiegers bombarding a defended town; (11) Violations of the Geneva Conventions; (12) Attack on, or sinking of, enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit; (13) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention; (14) Unjustified destruction of enemy prizes; (15) Use of enemy uniforms and the like during battle and use of the enemy flag during attack by a belligerent vessel; (16) Attack on enemy individuals furnished with passports or safe-conducts and violation of safeguards; (17) Attack on bearers of flags

of truce; (18) Abuse of the protection granted to flags of truce; (19) Violation of cartels, capitulations, and armistices; (20) Breach of parole."[16]

Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929 provided for war crimes. The Articles of the Hague Convention, which are largely embodied in the Geneva Conventions of 1949, prohibits among other things all needless cruelty; the destruction of human life and property, unless justified by reasons of military necessity; the confiscation of private property; requisitions, except for the needs of an occupation force, and pillage. The Convention further stipulates that it is forbidden to abuse or murder an enemy who has laid down his arms or to deny him quarter. The Charter of the International Military Tribunal at Nuremberg (also at Tokyo) contained provisions for War Crimes, Crimes Against Peace, and Crimes Against Humanity.

The right of States to prosecute foreign nationals for various crimes has also raised controversy among the writers. According to the territoriality principle, based on the Lex Loci rule, a government may prosecute crimes which were committed within its national geographic bounds. On the other hand, according to the universal principle

---

16. Ibid., note 2, pp. 867-868.

of jurisdiction, states can order to punish such violations, regardless of where or by whom they were committed, and if such acts of violation threaten their security or harm their nationals. However, the practice of States is not uniform regarding these two principles of jurisdiction.[17]

Question, therefore, arise that how far the criminal laws were established in various war trials, and how far these laws, applied through the trials, affect the status of the individual in international law?

It is, therefore, necessary to discuss some of the important war trials and to examine their effect on the individual status.

Survey of some ancient war trials

History of war trials are as old as the history of war itself. Examples of war crimes trial cases can be found in the history of every nation.

Professor George S. Maridakis, in a lecture at a session of the Athens Academy on December 27, 1951, mentioned some examples from ancient Greek history as war crime trials.[18] He said that from the reports of Xenophon

---

17. Woetzel, op. cit., pp. 58 - 68.

18. Quoted from Woetzel, op. cit., p. 17.

it could be found that after the destruction of the Athenian fleet at Aegospotamos in 405 B.C. by the Lacedaemonian admiral Lysander, the victor called together his Allies in order to determine the fate of the prisoners. The Athenians among the prisoners were accused of a number of actual and planned war crimes, and they were all sentenced to death, except for Adeimantus who was supposed to have opposed the plan for commission of brutalities in the event of a victory. Maridakis described the Council of the Allies as a kind of court which heard witnesses and examined the evidence before passing judgment.

This example of 'precedent' for the Nuremberg trial has been criticised by the German author Ulrich Kraske on various grounds such as : Xenophon's text does not mention about hearing of any witnesses in the Allies court in 405 B.C.; secondly, Adeimantus was acquitted, because he betrayed his side to the victors; and finally, Lysander himself was accused of having ordered the extermination of every person found outside the city of Athens before he attacked it, and he forbade the burial of the executed, which does not speak for his obedience to customs of civilized warfare.[19]

In view of such ambiguity and in view of the fact

---

19. Ibid., pp. 18-19.

that "modern international law has no direct roots in antiquity" [20] due to the difference in time and circumstances, this example of Maridakis may not be a true 'precedent' for the Nuremberg trial. Yet, the crimes committed by the Athenian fleet as narrated, falls under first, "War Crimes: namely, violations of the laws or customs of war", and secondly, "crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression".[21] For such crimes, the modern law of nations prescribes individual punishment and herein the 'individual becomes a direct subject of international law'. Furthermore, the court of the Allies in 405 B.C. shows an early attempt of the nations for 'collective decision' by a multinational court, which might be viewed as a step towards the formation of an international tribunal to decide war crime cases.

The second example cited by Maridakis from ancient Greek history occurred in 427 B.C., when a small force which was encircled in Plataia surrendered unconditionally to the Lacedaemonians after those had promised not to punish anyone who had not committed a crime. A court was formed composed of five judges from Sparta who asked the defendants whether they had in any way aided the

---

20. Ibid., p. 19.

21. Article 6(a) of the Nuremberg Charter.

Lacedaemonians and their Allies during the war. After the defendants had all replied in the negative, they were sentenced to death and executed.[22]

Kraske, the German author, has also criticised this as a totalfarce and quoting Thucydids, he says, that the decision of the Lacedaemonians to hold a trial was prompted by their wish to keep their Allies, the Thebans, who were particularly hostile to the Plataians.[23] Whatever might be the fact, the procedure of asking the defendant "whether he pleads 'guilty' or 'not guilty'",[24] in view of giving the defendant a fair trial has been too established in the Nuremberg and subsequent trials. This is also related to the 'Human Rights' conception of the individual, recognized by the international community. Of course, the conventional right of the victor belligerent to punish war criminals falling within his hands has, long since been recognized.[25] But the procedure of 'summary execution', which is, more or less, a crude form of justice, has been rejected by the modern international law.

---

22. Woetzel, op. cit., pp. 17-18.
23. Ibid., p. 19.
24. Article 24(b) of the Nuremberg Charter.
25. Oppenheim, International Law, op.cit., para 257c, pp. 587.

The third case which is cited in the literature on war crimes trial, from the ancient history, is the trial of Sir Peter of Hagenbach in 1474.[26] In 1469 Duke Charles of Burgundy forced the Archduke of Austria to pledge to him his possessions on the Upper Rhine owing to financial difficulties. One of these possessions was the fortified town of Breisach where Charles installed Sir Peter of Hagenbach as Governor or "Landvogt". Hagenbach instituted a regime of terror in the town of Breisach. His crimes were unique in their ferocity even in those rough and dangerous times. The neighbouring states, Austria, France and the towns and Knights of the Upper Rhine, finally united to restrain Charles of Burgundy in his plans of conquest. In the war that followed Peter of Hagenbach was captured, and later Charles was killed in the Battle of Nancy.

On May 4, 1474, Hagenbach was tried in the market place of Breisach for the crimes he had committed as Governor of that city. The trial was ordered by the Archduke of Austria in whose territory Hagenbach was captured. The bench before which he was tried consisted of judges from Austria and the Allied cities, as well as sixteen knights representing the order of knighthood.

The court rejected Hagenbach's preliminary objections to its jurisdiction. He based his defence on the plea of

---

26. Quoted from Woetzel, op.cit., pp. 19-22.

superior orders: there could be no other judge or master for him but the Duke of Burgundy from whom he had received his commission and orders; as a soldier he owed absolute obedience to his superior, and he, therefore, had to obey the Duke's orders. After a brief trial, Sir Peter was sentenced to death and executed.[27]

The international character of the Breisach trial as a true precedent to the Nuremberg trial has been supported by some writers.[28] On the other hand, its international character has been rejected by some other writers.[29]

Although, it is said, that the case of prosecution was based upon the laws of humanity, actually, Hagenbach was charged with nothing more or less than the ordinary crime of murder.[30] So, under the modern law of nations, the case can be favourably brought under the "Crimes against humanity".[31]

The plea of superior orders, of course, has been used as a defence in various war crimes trials including the

---

27. Ibid., pp. 19-20.

28. Finch, George A., "The Nuremberg Trial and International Law", American Journal of International Law, Vol. 41, 1947, p. 20.

29. Woetzel, op. cit., pp. 21-22.

30. Ibid., pp. 20-21.

31. Article 6(c) of the Nuremberg Charter.

Nuremberg and Tokyo trials.[32]

It is clear, however, that an individual accused of war crimes, like that of Sir Peter of Hagenbach, can not take the plea of 'Superior order' as an absolute defence. This, definitely affects the status of individuals acting as 'Heads of State or responsible Government Official'[33] or even ordinary soldiers on duty.

After the Thirty Years' War, a new system of international law developed on the basis of relations between independent sovereign States, which opened a new phase in the history of the war crimes trials.

In the second half of the eighteenth century several trials took place in Great Britain and the United States in which individuals were accused of committing international offences, even though these acts had not been branded as domestic crimes. For example, in 1796 an English court

---

32. See Principle IV, of the report of the International Law Commission formulating the Nuremberg Principles, which was accepted by the U.N. General Assembly on December 12, 1950. See, The Work of the International Law Commission, Revised Edition, Office of Public Information, United Nations, New York, 1972, p. 82; For the full text see Chapter V.

33. Ibid., Principle III, p. 82; Also see, Article 7 of the Nuremberg Charter, which reads: "The official position of Defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

sustained a conviction for furnishing of unwholesome food to French prisoners to the discredit of the king, and rejected the argument that the act had not been perpetrated in breach of any contract with the public or of any moral or civil duty.[34] However, these trials were not international as they affected the nationals of one country only.[35]

Case of Napoleon Bonaparte

The treatment of Napoleon Bonaparte, the vanquished foe, by the victorious Allied powers at the beginning of the nineteenth century, was an example of non-judicial or executive action of the victors.

Napoleon had agreed to retire from war activity according to the Convention of April 11, 1814, with Austria, Prussia, and Russia. But he escaped from Elba and re-entered France with an army. The Congress of Vienna issued a Declaration on March 13, 1815, which charged Napoleon with having violated his agreement; thereby placing himself outside the protection of the law. As an 'Outlaw', he was subject to any action that the victorious Powers should deem appropriate and effective.[36] The Prussian Marshal Blucher recommended that Napoleon be shot on sight, but after further deliberations he was entrusted to the custody of the British Government to which he had surrendered and

---

34. Woetzel, op. cit., p. 22.
35. Ibid., p. 23.
36. Ibid., p. 23.

which banished him to the Island of St. Helena.[37] The other Allied Powers had the right to send observers to the place of exile.

No doubt, the case of Napoleon is an instance of collective action of the states and which, in that sense, may be a precedent in modern international law. Even then it was not a 'trial' in the juridical sense, which in modern international law ensures "fair trial for the Defendants".[38]

The question of executive action, as suggested in the case of Napoleon, was also considered at length after the Second World War in a series of meetings held at the beginning of June 1945, in London. Of course, the possibility and desirability of executive action and other possible courses of action, were considered in these meetings to deal with the major war criminals, particularly the German Nazi criminals for their atrocities committed during the War. Speaking about the possible courses of action Viscount Kilmuir said in 1956 that : "Three possible courses of action faced us. The first was to do nothing at all and to let those whom we believed to be major war criminals go free. The second was to deal with them by executive action (and here the precedent of Napoleon was of course in our minds). The third was to permit them to be heard

---

37. Ibid., p. 23; Also Glueck, S., The Nuremberg Trial and Aggressive War, New York, 1946, pp. 9 - 10.

38. Article 16 of the Nuremberg Charter; And also, Principle V, The Work of the International Law Commission, op. cit., p. 68.

in their own defence and to let a tribunal decide judicially their innocence or guilt".[39]

The first course, that is, to free the war criminals without any trial was not possible because of the fact that they have committed "too many horrors", and, moreover, such a course would "mock the dead and make cynics of the living".[40]

Regarding the proposal of taking executive action there are various answers. When the Great War ended with all its madness and disintegration, most people in Europe, whatever their politics or religion, felt deeply the need to return to ordered systems of justice, as the only basis of freedom, happiness and comfort. The re-establishment of civilization itself depended on the fulfilment of this need. And this fulfilment would have been frustrated from the beginning if the first and most important question of guilt or innocence facing the world after the War had been decided by the strong hand and not in the light of justice. Moreover, natural justice requires that an accused should

---

39. Kilmuir, Viscount, Right Hon., Nuremberg in Retrospect, Presidential Address, Published by the Holdsworth Club of the University of Birmingham, 1956, (Original Source), p. 2. Right Hon. Kilmuir (later Lord Chancellor) was the Attorney General of Her Majesty's Government and was the Chairman of a series of meetings conducted in the beginning of June, 1945, in London, with Mr. Justice Jackson, the U.S. representative, and the representatives of the Soviet Union and France.

40. Statement of Mr. Justice Jackson, quoted in Kilmuir, op. cit., pp. 2-3.

know what is the charge against him and be given an opportunity to make his answer. If this is not present, then "martyrs would be created" by the very fact of procedure. Therefore, the absence of justice would, instead of consigning the war criminals quickly to oblivion, raise their memories to trouble succeeding generations.

Furthermore, humanity in general does not like to face unpleasant facts, especially when a war has produced great mental and physical lassitude. The trite escape from unpleasant facts is to imagine that they have not happened. It was necessary, however, that mankind should be compelled to recognize what evils a war, armed by modern science, could contrive. Therefore, if the scientific and material advances are to end in progress and not in ruin, mankind must be aware that barbarism always lurks close beneath the delicate surface of civilization and has not been left behind.

Another practical consideration for executive action also exists. Whoever took that action, whether he were soldier or politician or lawyer, would have had to decide which of the accused should be hanged, which shot, and which receive some appropriate lesser punishment. To punish merely on rumour or reputation would be to adopt methods which are already condemned. Someone would have had to

come secretly to what was an essentially judicial conclusion, secure from the critical scrutiny of public opinion and on evidence, the validity of which he alone would assess. It can be concluded, therefore, that executive action is uncertain, capricious in its effect, and is distasteful to any sense of justice.[41]

As a result, modern international law has disapproved the treatment of vanquished foe by collective "executive action", as it was done in the case of Napoleon; instead, it ensures "fair trial" of the accused by a competent judicial tribunal.

Some other war trials in the Eighteenth and Nineteenth Centuries.

Several acts committed "within enemy lines by persons in civilian dress acting under or associated with the enemy armed forces", are recognized by most of the States, as war crimes. Such acts include, damage to war material, railways, telegraph or other means of communication, carrying of messages secretly, and any hostile acts committed by persons who pass through enemy lines for this purpose and such other acts.[42]

---

41. Kilmuir, op. cit., pp. 3-4: "It must be remembered that the prosecutors at Nuremberg indicted, and argued for the conviction of three defendants, Schacht, von Papen and Fritzsche, whom the Tribunal acquitted". See Chapter IV of this work for the judgment of the IMT at Nuremberg.

42. Woetzel, op. cit., p. 25.

A case of this type has been illustrated by Oppenheim. To quote him: "A remarkable case of this kind occurred in 1904, during the Russo-Japanese War. Two Japanese disguised in Chinese clothes were caught in an attempt to destroy, with the aid of dynamite, a railway bridge in Manchuria, in the rear of the Russian forces. Brought before a court-martial, they confessed themselves to be Shozo Jakoga, forty-three years of age, a major on the Japanese General Staff, and Teisuki Oki, thirty-one years of age, a Captain on the Japanese General Staff. They were convicted, and condemned to be hanged, but the mode of punishment was changed, and they were shot. All the newspapers which mentioned this case reported it as a case of espionage; but it was in fact one of war treason. Although the two officers were in disguise, their conviction for espionage was impossible according to Article 29 of the Hague Regulations; provided, of course, that they were court-martialled for no other act than the attempt to destroy a bridge".[43]

While committing these acts, a person may be tried as a war criminal if he is without uniform; on the other hand, if these acts are committed by a soldier in uniform then, he will be tried as a Prisoner of War.[44]

---

43. Oppenheim, op. cit., note 1, p. 576.

44. Woetzel, op. cit., note 13, p. 25.

Prisoners of war may also be tried for crimes committed before their capture. A case often referred in this connexion is the trial of Henry Wirz, Commandant of the notorious Confederate prisoner of war camp in Andersonville, before a U.S. military tribunal in Washington, D.C. He was tried under Article 59 of the "Instructions for the Government of Armies of the United States in the Field" of April 24, 1863, according to which prisoners of war were liable to prosecution for crimes they had committed before their capture. He was found guilty of causing the deaths of many Union prisoners through criminal negligence, and was sentenced to death.[45]

The British courts, after the Boer War, tried prisoners of war for the crimes they had committed before their capture.[46] Until sometime in the First World War, the German Courts and the German Code of Military Justice of 1872 (Para. 158) maintained that prisoners of war could not be tried by their captors for crimes they had committed before their capture, with the exception of a number of acts which could be prosecuted as violations of customary international law, according to German law.[47] But during the First World War, when the French courts prosecuted the

---

45. Ibid., p. 26.
46. Ibid.
47. Ibid., pp. 26-27.

German prisoners of war, the German courts soon followed the same practice while trying the Allied prisoners of war for violating the laws of war and the Hague Rules of Land Warfare of 1907.[48]

All such acts committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy except, of course, hostilities in arms on the part of the civilian population, spreading seditious propaganda by aircraft, and espionage, are called 'War-treasons' Making a survey of the possible War treasons, Oppenheim observed the following acts to be the chief cases of War treason: "(1) Information of any kind given to the enemy; (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy; (3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise; (4) Attempting to induce soldiers to desert, to surrender, to serve as spies, and the like; negotiating desertion, surrender, and espionage offered by soldiers; (5) Attempting to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe; (6) Liberation of enemy prisoners of war; (7) Conspiracy

---

48. Ibid., p. 27.

49. Oppenheim, op. cit., p. 578.

against the armed forces, or against individual officers and members of them; (8) Wrecking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose; (9) Intentional false guidance of troops by a hired guide, or by one who offered his services voluntarily; (10) Rendering courier, or similar services to the enemy." [50]

Helping the liberation of enemy prisoners of war, is an accepted war crime. An interesting case illustrates this point. Miss Edith Cavell was a Red Cross nurse. She was posted at Brussels during the First World War. She was tried by Germany as a war criminal on the charge that she assisted the Allied soldiers in escaping. At the trial she pleaded guilty straight-forwardly. When questioned about the motive, she said that, she thought it to be her sacred duty to help her countrymen to escape as they were going to be shot mercilessly by the Germans. American Ambassador in Belgium wanted to intervene in the case but was not kept informed officially regarding the development of the case. Ultimately Miss Cavell was executed by the Germans in 1916. The Jurists unanimously said that even if the charge against Miss Cavell was proved and sentence , perhaps justified

---

50. Ibid., note 5, p. 575.

according to "strict and narrow letters of law", the execution was an outrage, as she was a noble lady, and had served with equal devotion, German, British, and French soldiers.[51]

This case shows that members of any organisation, may be humanitarian, can be tried for war crimes without enjoying any special status under international law.

War Trials after the First World War

The Allied "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" met on January 25, 1919, to suggest penalties for the war criminals.[52] In its report to the Preliminary Peace Conference in Paris, the Commission recommended the trial of persons commiting the following acts:

"(a) Acts which provoked the world war and accompanied its inception;

(b) Violations of the laws and customs of war and the laws of humanity." [53]

The Commission Report stipulated that all enemy persons who had committed such acts should be liable to

---

51. Ibid., note 5(6), p. 575.

52. Woetzel, op.cit., p.27; Also see Oppenheim, op.cit., note 2, p. 587.

53. Woetzel, op. cit., p. 28.

criminal prosecution, regardless of their rank or authority. It also confirmed that a person could be tried under international law for violations of the laws and customs of war. Further, it specified four kinds of offences which could be tried by an international tribunal: (1) acts involving civilians or members of the armed forces of several Allied nations; (2) offences by persons in authority whose orders affected the conduct of the war on several fronts; (3) acts by civil or military authorities, "without distinction of rank, who ordered, or abstained from preventing, violations of the laws or customs of war"; and (4) offences by enemy persons "as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the High Tribunal." [54]

The Commission recommended that the "High Tribunal" to be constituted, should consist of three members from each of the five major Allied Powers and one from each of the other Powers.[55] The law of the Tribunal would be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." [56]

---

54. Ibid.

55. Ibid., pp. 28-29.

56. Ibid., p. 29.

Although the majority of the Allied nations approved the Commission's recommendations, the American delegates at the conference, Scott and Lansing, dissented on several points: first, they objected the creation of an international criminal court on the grounds that "a precedent is lacking" and it "appears unknown in the practice of nations", and suggested instead that an international tribunal, if established, "should be formed by the mere assemblage of the existing national military tribunals or commissions", which had "admitted competence" in the matter. Secondly, they refused to assent to the doctrine of "indirect responsibility" or "negative criminality", according to which a person could be prosecuted for his failure to prevent the commission of an illegal act. Thirdly, they also objected to the prosecution of a Head of State, on the grounds that a "sovereign agent of a state", could not, as chief executive, be subjected to the jurisdiction of a foreign state: "the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty".[57] This involves certain technical points regarding the subjectal status of individual in international law.

---

57. Ibid.

The Treaty of Versailles

The recommendations of the Allied Commission of 1919 had an important influence on the drafting of the articles on the punishment of war criminals in the Peace Treaty of Versailles. Article 227 of the Treaty provided that the German Kaiser, William II of Hohenzollern, should be "publi arraigned" for a "Supreme offence against international morality and the sanctity of treaties" [58] and tried before a specially constituted tribunal. In a report accompanying the ultimatum of June 16, 1919, the Allied Powers explained however, that the trial of the Kaiser was an 'act of high policy' and its judicial character was merely a matter of form. Herein it resembles the Declaration of the Congress of Vienna in the case of Napoleon.

By Article 228 of the Treaty of Versailles "the German Government recognized the right of the Allied and Associated Powers to bring before military tribunals person accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law".[59] The German Government was obligated to hand over the persons wanted for trial.

---

58. Ibid., p. 30; Also see Oppenheim, op. cit., note 3, p. 569.

59. Oppenheim, op. cit., note 2, p. 587.

Article 229[60] provided that persons accused of committing illegal acts against one of the Allied Powers, should be tried before the military courts of the respective nation. If the actions of the accused were directed against several nations, they should be tried before military tribunals composed of the members of military courts of the Powers affected. These courts could be described as inter-allied "mixed commissions". Under this Article, the defendants were also specifically guaranteed the right to choose their counsel.[61]

By Article 230 the German Government was bound to furnish all documents and other materials that could be used as evidence in the trials.[62]

Although these punitive provisions of the Treaty of Versailles were drafted carefully and accepted with all sincerity they, however, could not be materialised in the sense they were intended. Netherlands Government refused to extradite the German Kaiser from Holland for trial according to Article 227, on the grounds that the offence charged was "political" in nature, and not punishable according to Dutch law. Therefore, the trial was not proceeded with.[63]

---

60. Calvocoressi, Peter , Nuremberg.-The Facts, the Law and the Consequences, The Macmillan Company, New York, 1948, p. 16.
61. Woetzel, op. cit., pp. 30-31.
62. Ibid., p. 31.
63. Oppenheim, op.cit.,note 3,p.569;Also,Woetzel,op.cit.,p.31.

On February 3, 1920, the Allied Powers submitted to the German delegate at the Peace Conference in Versailles, Baron von Lersner, a list containing 896 names of persons who were to be handed over for trial, according to the provisions of Article 228. The list included the names of such high-ranking officers as the Imperial Crown Prince, Count Bismark, grandson of the "Iron Chancellor", and Marshal von Hindenburg. The German delegate refused to accept the list and resigned in protest, whereupon the Allied Powers transmitted the list directly to the German Government on February 7, 1920.[64]

The Leipzig Trials

The Germans made every effort to prevent the handing over of the persons charged with war crimes. They declared that they were willing to try these individuals themselves. On December 18, 1919, a law was passed by the "Reichsgericht" authorising the prosecution of war offenders. And on January 25, 1920, the German Government submitted a note to the Allied Powers suggesting that the accused individuals be tried before the Supreme Court of the Reich in Leipzig, with the assistance of official representatives of the interested opposition states. The German Government also indicated that the handing over

---

64. Woetzel, op. cit., pp. 31-32.

of persons on the Allied list would result in serious internal difficulties and public indignation which might endanger the newly constituted Weimar Republic.[65]

In the message of February 13, 1920, to the German Government, the Allied Powers finally consented to let the Germans try the persons accused of war crimes, but they reserved the right to institute their own proceedings according to Articles 228, 229 and 230 of the Versailles Treaty, if the German trials should not prove satisfactory. The German Government acknowledged this right. A sample "abridged list" containing forty-five names of persons, to be tried before the Supreme Court at Leipzig, was submitted by the Allies to the Germans.[66]

The German court at Leipzig applied German law in weighing the charges and passing sentence. Of course, it admitted that, in case of an offence against customary international law, the illegality of an act can be established. This policy of the court which has been referred to as European "continental practice" ("Kontinentale Auffassung") would not permit prosecution of illegal acts directly according to international law.[67]

---

65. Ibid., p. 32.

66. Ibid., p. 32; Also see Calvocoressi, P., op. cit., pp. 20-21.

67. Ibid., note 37, p. 33.

In the "Dover Castle" case, which was decided in 1921, the court held that defence of superior orders is valid, if the person receiving the orders does not go beyond them, and if he can not reasonably, be expected to know that the act ordered involved a criminal or civil misdemeanour "It is a military principle that the subordinate is bound to obey the orders of his superiors".[68] In this sense Kelsen says: "the idea of justice ... is certainly not favourable to the prosecution of individuals who commit war crimes in response to a superior command".[69]

Further, in the "Heynen" case, related to the treatment of prisoners of war, the court held that force might be used against prisoners, in order to maintain discipline. "It is essential, however, that, in the use of physical force, whether by the use of weapons or without, a man ... should not exceed the degree of force necessary to compel obedience".[70]

It is interesting to note that in the "S.S.Llandovery Castle" case where two German submarine officers were arraigned for assisting in executing an order by the Commander of their submarine to fire on the life-boats of the British hospital ship, Llandovery Castle, which had been sunk, the court held the defendants guilty of homicide under Article 212 of the German Penal Code. According to

---

68. Ibid., p.33; Also see, Oppehneim, op.cit., pp.505>569.
69. Kelsen, H., op. cit., p. 107.
70. Woetzel, op. cit., p. 33.

Article 47, paragraph 2, of the German Military Code of Justice, a subordinate who obeys an order which is clearly contrary to law, is liable to prosecution and punishment.[71] This means that "the defence of superior orders would afford no justification where the act was manifestly and indisputably contrary to International Law as, for instance, in the case of killing of unarmed enemies or of shipwrecked persons who have taken refuge in lifeboats".[72] This "judgment purported to and did express existing international law."[73]

Out of forty-five cases submitted by the Allies, twelve were tried by the Leipzig court, and six defendants were convicted. The Allied Powers were highly dissatisfied by this showing. The Allied Commission which had been sent to Leipzig withdrew in protest at the outcome of the twelve trials. The Commission of Allied jurists which investigated the Leipzig trials, recommended on January 14, 1922, that no further cases be submitted to the German Court, and that the Allies conduct the trials themselves according to Articles 228 - 230 of the Versailles Treaty. The Conference of Ambassadors which met in August 1922, expressed its support of these recommendations, and resolved that the

---

71. Ibid., p. 33.

72. Oppenheim, op.cit., note 3, p. 338, and note 2,p.569.

73. Kilmuir, op. cit., p. 15.

Allied Powers reserved the right to prosecute the war criminals, if necessary 'in absentia'. The Allies, however, did not again request the extradition of the accused individuals, and only very few trials in absentia were held in Belgium and France. It is still interesting to note that all the prisoners convicted of submarine atrocities managed to "escape" from German jails. Thus ended the most historic attempt of several nations to institute judicial proceedings against nationals of a vanquished state for alleged war crimes.[74]

Commenting on the Leipzig trials, Calvocoressi writes:

"The precedent of the Leipzig trials at the end of the first World War sufficed to rule out any repetition of that unjust and injudicial farce. In 1918 the Allies had not originally envisaged a trial before a German court, and when so unprecedented a method was first mooted they reacted to the suggestion by declaring that it was impossible to leave war criminals to be tried by their 'accomplices'. Subsequently, however, they relented, and in the circumstances their change of ground was nothing less than a political retreat, which was not without political consequences. Meanwhile a list of war criminals had been prepared. This list contained about a thousand names, from which forty-five were selected and passed to the Germans for a start.

---

74. Woetzel, op. cit., p. 34.

Twelve were brought to trial at Leipzig. Three generals who were accused on what appeared at least to be prima facie substantial grounds were not even called upon to defend themselves, since the prosecutor took it upon himself to ask the court to dismiss the charges against them without hearing the evidence. The others, against whom atrocious acts of brutality were proved, hardly if at all less horrible than the stories which have seeped through the barriers of the concentration camps, received sentences of a few months' imprisonment. At least one was released as a free man immediately he had been convicted".[75]

The Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" was indeed an improvement in the field of international penal law and its codification. By declaring that persons of all ranks, status or authority are liable to criminal prosecution for 'violations of the laws and customs of war and the laws of humanity', the Commission had side-tracked the traditional principle of immunities enjoyed by certain categories of people. Further, by confirming that a person could be tried by his captors under international law, for violations of the laws and customs of war, the Commission made the base of the principle that

---

75. Calvocoressi, op. cit., pp. 20-21.

the victor belligerent has the conventional right to punish and try the vanquished persons,[76] more solid. This principle was further developed by Article 228 of the Versailles Treaty.

The Ultimatum of the Allied Powers of June 16, 1919, declaring that the "trial of the Kaiser was an act of high policy", made the issue more political rather than judicial. Also the charge against the German Kaiser for "supreme offence against international morality and the sanctity of treaties" provided by Article 227 of the Treaty, was something unique. Execution of the punitive provisions of the Treaty of Versailles resulted in a tug-of-war between the victor and the vanquished, ending in a political dislocation. Yet, at the ultimate point it was a contest between two basic principles of international law, that is, the victor belligerent's right to punish the captured or surrendered enemy nationals, and on the other hand, the obligation of a sovereign state to protect its nationals.[77] However, the position was made clear in the subsequent war trials.

Reviewing the consequences of the Leipzig trials and the Versailles treaty, various attempts were made by

---

76. Oppenheim, op. cit., para. 257c, p. 587.

77. Jessup, Philip C., "Force Under a Modern Law of Nations", Foreign Affairs, An American Quarterly Review, Index Vol. 25 (Nos.1-4), October 1946 - July 1947, New York, p. 97.

private associations and individual authors, for the constitution of an international criminal court.[78] Also several war trials took place between the two great wars in which, many nations came to accept individual liability for certain crimes directly under international law, so that a person could be tried for some violations of customary international law with or without prior statutory definition of the act as illegal.[79]

Sometimes international law is implied in the national statutes. In the 'Ex p. Quirin' case' in 1942, involving the trial of seven German saboteurs for violations of the laws and customs of warfare, the U.S. Supreme Court decided that: "It is no objection that Congress in providing for the trial of such offences has not itself undertaken to codify that branch of international law to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing 'the crime of piracy, as defined by the law of nations' is an appropriate exercise of its constitutional authority ... since it has adopted by reference the sufficiently precise definition of international law ... Similarly by the reference in the 15th Article of War to

78. Woetzel, op.cit., p. 36. Also see Chapter V.

79. Ibid., p. 36.

'offender or offences that ... by the law of war may be triable by such military commission', Congress has incorporated by reference ... all offences which are defined as such by the law of war".[80]

Although the U.S. Supreme Court in this case used international law to define the crime, it actually based itself on the implied authorisation to do so contained in the 15th Article of War. The principles applied in this case, however, were confirmed by the practices adopted by most of the States. Several war trials in the Soviet Union and the German proceedings against a number of Allied prisoners during the second world war, though not of international character, confirmed the principle of individual liability under international law.[81] On the other hand, this case also has been interpreted to show that national law applies to the individual and not international law, since Congress has incorporated, by the reference in the Articles of War to "offender or offences that ... by the law of war may be triable by such military commission", all offences which are defined as such by the laws of war. It is said, therefore, that the individual is held responsible under American military law rather than international law.[82]

---

80. Ibid., p. 37; Also see Trial of the Major War Criminals, op. cit., Vol.XXII, p. 465.

81. Woetzel, op. cit., pp. 37-38.

82. Ibid., pp. 102-103; Also see Finch, George A., op. cit., p. 21.

Alternatives of War Trials

Various other methods to deal with the vanquished or captured enemies by the victors have been experimented from time to time. Granting general amnesty instead of resorting to punitive measures, is one of such methods. This practice was followed in Article 2 of the Westphalian Peace Treaty of 1648: the Peace Treaties of Utrecht in 1713, of Aachen in 1748, and Paris in 1763.[83] But this method of granting general amnesty has been opposed from different point of view[84] and has not been welcomed by modern international law.

Also the idea of summary execution, as it was done by Charlemagne, executing 4,000 nobles, after subjugating the Saxons, or by the Charles of Anjou ordering the decapitation of Konradin of Hohenstaufen after the Battle of Tagliacozzo,[85] has not been favoured by modern international law in view of the 'fair trial'[86] it assures to the defendants. It is said to be a crude and brutal method.

---

83. Woetzel, op. cit., p. 38.

84. Kilmuir, op. cit., pp. 2-3.

85. Woetzel, op. cit., pp. 38-39.

86. Wright, Quincy, "War Criminals", American Journal of International Law, (Supp.), Vol. 39, 1945, pp.257-258.

Modern Law of Nations, therefore, favours the idea of bringing the war criminals to the light of fair justice through some competent tribunal and to arrange for the punishment of the war guilt. But the basic questions those arise are: can such punishments totally abolish war: can such trials touch the basic causes of war; can it end the hostilities between the victor and the vanquished; and, to what extent it affects the status of individuals in international law?

Some sociologists, however, question whether such punishment can be rationally justified. Noting that "in the controversial realm of social policy we are tempted to judge our actions in terms of logical abstractions or sentiments and to reject the pragmatic test", and judging by past history, criminological theories, and the findings of sociology and psychology, C. Arnold Anderson concludes: "If we are seeking to assist in the abolition of war, the trial of defeated leaders by their conquerors is inappropriate. The justifications that may be offered for such trials do not touch the basic causes of war. Future leaders who might lead another war are not eliminated. The attitudes that the victors would have to adopt, in this day of mass democracy, in order to assume so heavy a responsibility contradict the conditions of international relations upon which peace must rest. The defeated nations would

not be conciliated. The trials would drive victor and vanquished farther apart than they were at the end of hostilities".[87]

Philosophers and criminologists have differed as to social justification for any criminal punishment.[88] "The following objectives have been suggested for punishing war criminals: (1) Vindication of principles of civilized justice and promotion of the rule of law. The rule of law would not be promoted if those guilty of acts generally regarded as atrocities were not punished. (2) Prevention of further crimes or leadership by the criminals. There may be real danger of renewed leadership by the Nazi and Fascist leaders if alive or if martyrised. (3) Retribution satisfying popular demands of liberated peoples for revenge and of enemy peoples for a scapegoat. Peace would not be promoted by mass massacre of innocent enemy peoples or by indiscriminate branding of all enemy peoples as criminals thus reuniting them for a war of revenge. (4) Deterrence of potential war criminals in the future from committing similar offences. Impunity of war criminals might encourage

---

87. Anderson, C. Arnold., "The Utility of The Proposed Trial and Punishment of Enemy Leaders," American Political Science Review, Vol. 37, 1943, pp.1081, 1098-9.

88. Wright, Quincy., "War Criminals", op. cit., note 14, pp. 259 - 260.

further leaders to try it again".[89]

These objectives seem to require scrupulous care for the principles of criminal justice and avoidance of identification of the war criminals with the enemy people or state i.e. symbolic indictment and conviction of the entire enemy population in the war criminal trials, and punishments which are not commensurate with the offences. Anderson's criticism of such trials springs partly from his scepticism as to the possibility of realizing these conditions.[90]

Various methods of dealing with the war criminals has developed in international law over the last century. Such methods include, providing general amnesty, summary execution, trial by national, military or administrative courts or tribunals of the victorious states or of that of the "accomplices" of the accused. But none of these methods proved very successful.

Second World War and the War Trials

The Second World War witnessed war crimes on a scale unprecedented in history. Those crimes were mainly committed

---

89. Glueck, S., War Criminals, Their Prosecution and Punishment, New York, 1944, p. 16; Also see Wright, "War Criminals", op.cit., note 14, pp.259-260.

90. Wright, Quincy, op. cit., note 14, pp. 259-260. Also see Calvocoressi, P., op.cit., pp. 13-14.

by Nazi Germany and, to a lesser extent, by her allies. Briefly those crimes were: illtreatment of prisoners of war and civilians, occupation of vast territories, ruthless economic exploitation of the occupied territories and their population, forcible deportation of inhabitants for forced labour, cruel and planned annihilation of large sections of population for their racial origin and the like. Those outrages shocked the conscience of civilized nations. At various times during the war, the Allied leaders and statesmen had publicly declared that the defeated Axis War criminals would be brought to trial, when the war was over.[91] These declarations, however, established no new principle, because the right of the victorious belligerent to punish the defeated war criminals, had been accepted for centuries.[92] Accordingly, simultaneous warnings were made by President Roosevelt and Prime Minister Churchill, on October 25, 1941, against the Axis Powers, for retribution of their crimes.[93]

St. Jame's Declaration

The first inter-Allied Declaration on war crimes was adopted at St. Jame's Palace, London, on January 13, 1942,

---

91. Calvocoressi, op. cit., p. 15; Also see Woetzel, op. cit., p. 3.

92. Calvocoressi, op. cit., p. 3.

93. The Trial of the Major War Criminals, op. cit., Vol. XXII, 1948, p. 461; Also see Woetzel, op. cit. p. 3.

by the representatives of nine European Powers. Parties to the Declaration were: Belgium, Czechoslovakia, France, Greece, Luxembourg, Netherlands, Norway, Poland and Yugoslavia.[94]

The Declaration condemned the aggressive policy of the Axis powers, particularly that of Germany. It also condemned the regime of terror created by the Axis powers in the occupied countries by imprisonment, mass expulsions, the execution of hostages and massacres. The Declaration affirmed that violence against the civilian populations are, against the rules of war, accepted by the civilized nations. Therefore, it decided to "place among their principal war aims the punishment, through the channels of organised justice, of those guilty or responsible for those crimes, whether they have ordered them, perpetrated them, or participated in them...".[95] The Chinese Government on January 9, 1942, and the Soviet Government on October 14, 1942, accepted the principles of the Declaration.[96]

United Nations War Crimes Commission

The proposal for the establishment of a United Nations

---

94. Woetzel, op. cit., p. 3.

95. Full text in Lord Wright, History of the United Nations War Crimes Commission and the Development of the Laws of War, 1946, Appendix B, pp. 109-113.

96. Woetzel, op. cit., p. 4.

Commission for the Investigation of War Crimes, was simultaneously made by President Roosevelt and the British Lord Chancellor, Lord Simon, on October 7, 1942. A diplomatic conference of seventeen nations was convened at the British Foreign Office, on October 20, 1943, at the invitation of the British Government. The Commission was composed of representatives of the following countries: Australia, Belgium, Canada, Nationalist China, Czechoslovakia, Denmark, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the United Kingdom, the United States, and Yugoslavia. It sat at London, holding its first official meeting on January 11, 1944. It terminated its activities on March 31, 1948.[97]

The activities of the Commission were mainly two, first, to prepare a list of war criminals, and second, to recommend the members on various problems relating to the apprehension, trial, and punishment of war criminals. In preparing its lists, the Commission, considered the documents presented to it by member Governments but did not hold oral hearings. Moreover, its lists were not equivalent to formal indictments.

---

97. For the full text see History of the United Nations War Crimes Commission and the Development of the Laws of War, His Majesty's Stationery Office, London, 1948.

A Far Eastern and Pacific Sub-Commission, as a branch of the U.N. War Crimes Commission, was established pursuant to a decision of the latter body, met at Chungking, and subsequently at Nanking. It started its work on November 29, 1944, and terminated its activities on March 31, 1947. It considered largely cases submitted to it by the Nationalist Chinese Government and prepared lists of Japanese War Criminals.[98]

Moscow Declaration

A "Declaration of German Atrocities", signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin, was released to the press in Moscow on November 1, 1943. This Declaration, more commonly known as the Moscow Declaration, read in part:

" Accordingly, the aforesaid three Allied Powers, speaking in the interests of the thirty-two (thirty-three) United Nations, hereby solemnly declare and give full warning of their declaration as follows :

" At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the atrocities, massacres and executions, will be

---

98. Ibid., pp. 129-131, 144, 161-154.

sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free government which will be erected therein ...

"The above declaration is without prejudice to the case of the major criminals and who will be punished by a joint decision of the Governments of the Allies".[99]

At the Yalta Conference, the Allied statesmen announced on February 11, 1944, their "inflexible purpose to ... bring all war criminals to just and swift punishment," and at Potsdam, they declared that "Stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."[100]

From all these official pronouncements made by the Allied statesmen during the Second World War, until 1945, expressed their clear and definite intention to punish the war criminals, who had violated the laws and customs of warfare. Moreover, the Allies were satisfied that the Axis leaders had been guilty of crimes for which they could be punished by law. They were satisfied too, that they had

---

99. Press Release, IX U.S. Department of State Bulletin, No. 228, November 6, 1943, pp. 310-311.

100. XIII U.S. Department of State Bulletin, 1945, Art. III, pp. 137-138.

the evidence to prove this. They were, however, without a competent court to lay their complaint.[101]

London Conference

On June 26, 1945, representatives of the Governments of the U.S.A., the United Kingdom, the U.S.S.R., and France met in London to formulate proposals for the establishment of a joint military Tribunal for the trial of "Major War Criminals" of the European Axis, whose offences had " no particular geographical location ".[102] This was pursuant to the provisions of the Moscow Declaration of October 30, 1943, which declared that the major criminals whose offences had no particular geographical location, and who would be "punished by the joint decision of the Governments of the Allies".

The four leading persons at the London Conference were: for the United States, Mr. Justice Jackson; for the United Kingdom, Sir David Maxwell Fyfe, K.C., the English Attorney-General (until the change of Government on the 27th July,1945); for France, Robert Falco of the Cour de Cassation with his associate (adjoint) Professor Gros; and for the Soviet Union, General Nikitchenko, who was later to be appointed as one of the Judges at Nuremberg. The first two had been already designated as Prosecutors in the impending trial

---

101. Calvocoressi, op. cit., p. 16.

102. Maugham, Viscount, U.N.O. and War Crimes, John Murray, London, 1951, pp. 17, 25.

at Nuremberg.[103] At the Conference, these representatives were charged "to make arrangements for preparing and prosecuting the charges on the subject of aggression". A series of meetings were held from June 26 to August 8,1945.

London Agreement, 1945

On August 8, 1945, finally, an Agreement "for the Prosecution and Punishment of the Major War Criminals of the European Axis" was signed by the United States, the Provisional Government of France, the United Kingdom, and the Union of Soviet Socialist Republics, "acting in the interests of all the United Nations". This Agreement is otherwise famous as the "London Agreement" of 1945.

The London Agreement is specially significant in the process of development of international criminal law, because it provided the general framework for the establishment of the epochmaking International Military Tribunal (IMT), which is a milestone and a turning point in the history of war trials. The Charter, annexed to the Agreement, was the 'constitution' of the IMT. In view of its importance, the London Agreement is cited below in part:

---

103. Ibid., p. 27.

THE LONDON AGREEMENT

" The London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ... [104]

"Article 1[105]

" There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

"Article 2

" The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement.

"Article 3

" Each of the Signatories shall take the necessary steps to make available for the investigation of the

---

104. See Jackson, Robert H., "Report to the International Conference on Military Trials", (Jackson Report), London, 1945; Washington, 1949, U.S. State Department, 3080.

105. See Hankey, Lord, Politics, Trials and Errors, Oxford, 1950, for further analysis of the London Agreement.

charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

"Article 4

"Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

"Article 5

"Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other Signatory and adhering Governments of each such adherence.

"Article 6

"Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

"Article 7

" This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement".[106]

One difficulty faced by the representatives of four nations in the London Conference was to arrive at an agreement regarding a common code of law and procedure. It was mainly due to the fact that the four representatives at the Conference were brought up under different legal systems. For instance, "the U.S.S.R. regards a trial as one of the organs of Government power, a weapon in the hands of the rulers of the State for safeguarding its interests. The British view on the other hand is that the law is supreme and that neither King nor Judge has any right to depart from it".[107]

The legal validity of the historical London Agreement, the annexed Charter, and the Jurisdiction of the Court, have

---

106. See Calvocoressi, op. cit., Appendix One, pp.128-130.

107. Maugham, op. cit., p. 28; And also, 'Jackson Report', op. cit., U.S. State Department, 3080.

often been questioned. However, it depended on the fact of the unconditional surrender by the German Armies and the occupation thereafter of the whole of Germany by the four Allied Powers who signed the document.[108]

Schick, of course, maintained a different view. He said, "The London Agreement establishing the International Military Tribunal was an inter-Allied treaty and not a legislative act promulgated by the Control Council. In this Agreement the four original signatories declare expressly that they are 'acting in the interests of all the United Nations".[109] Further he continued, "Obviously the Control Council has legislative authority only with respect to the territory over which, in accordance with the Potsdam Declaration, the occupant Powers exercise their condominium; it can certainly not promulgate laws binding upon other European Axis countries, ... which never ceased to have their own national government".[110]

In pursuance with Article 5 of the Agreement, which said "Any Government of the United Nations may adhere to

---

108. Maugham, op. cit., p. 17.

109. Schick, F.B., "The Nuremberg Trial and the International Law of the Future", The American Journal of International Law, Vol. 41, 1947, p. 781.

110. Ibid., p. 781.

this Agreement", other than the four signatories, nineteen other nations[111] subscribed to the principles of the Agreement and its annexed Charter. A common indictment for twenty-three nations was presented before the International Military Tribunal at Nuremberg.[112]

Charter of the International Military Tribunal at Nuremberg.

Annexed to the Agreement of London was the Charter of the International Military Tribunal, which formed an integral part of the Agreement. The Charter of the International Military Tribunal at Nuremberg was the law at the trial and it was "decisive and binding on the Tribunal".[113] It laid down the procedural and substantive rules to be applied by the court in addition to the constitutional machinery provided for the Tribunal. The Charter, however, was said to be "a political Instrument" possible for the reason that the four Powers were in occupation of Germany on the unconditional surrender of the German Armies.[114]

---

111. Denmark, Norway, Belgium, Luxembourg, the Netherlands, Poland, Czechoslovakia, Yugoslavia, Greece, Australia, New Zealand, India, Ethiopia, Honduras, Panama, Haiti, Paraguay, Uruguay and Venezuela.

112. Woetzel, op.cit., p.6; Also Calvocoressi, op.cit., p.16.

113. The Trial of the Major War Criminals, op.cit., Vol.XXII, p. 461.

114. Maugham, op. cit., p. 34.

The Charter of the IMT (International Military Tribunal) consisted of thirty Articles altogether, divided into seven parts. The first part, consisting of five Articles, dealt with the constitution of the Tribunal. The Tribunal was established "for the just and prompt trial and punishment of the major war criminals of the European Axis".[115] The Tribunal shall consist of four members, each with an alternate. The alternate shall take the place of the member, in case of the latter's illness.[116] Each of the Signatories shall appoint one member and one alternate, who can be replaced for "reasons of health or for other good reasons" only.[117] The presence of all four members (or their alternates) shall constitute the quorum of the Tribunal. A President shall be chosen by the members. This may be done on the principle of rotation for successive trials. In case of a tie, except for convictions and sentences, the vote of the President shall be 'decisive'.[118]

Part II of the Charter (Article 6 - 13), dealt with "Jurisdiction and General Principles". It set forth the categories of crimes to be considered by the Tribunal. Also, in advance, it restricted the plea of superior orders and

---

115. Article 1 of the IMT Charter.

116. Article 2 of the IMT Charter.

117. Article 3 of the IMT Charter.

118. Article 4(b) of the IMT Charter.

eliminated the pleas of official position and impunity. The most important aspect of this part, from the view-point under consideration, is that, clearly and emphatically it establishes individual criminal responsibility. Article 6 of the Charter specifically states that for any crime coming within the jurisdiction of the Tribunal, "there shall be individual responsibility".[119] It is, further interesting, says Maugham that "until the Nuremberg Trial there never had been a case in which an International Court or Institution of any kind had described a breach of treaty by a state as 'an international crime', meaning one involving punishment of individuals".[120] Nevertheless, individuals guilty of violating the rules of land warfare have been tried frequently and punished as criminals by military tribunals.

Article 6 of the Charter mentions three categories of crimes. They are as follows :

"Article 6(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing;

---

119. Article 6 of the IMT Charter.

120. Maugham, op. cit., p. 43.

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".[121]

The Charter, opened a new vista by providing a new and systematic improvement in the classification of crimes,

---

121. Article 6 of the IMT Charter.

over and above those lists of crimes given in the past by various authors, judicial decisions or conferences. Moreover, it added certain new crimes while classifying them, such as, "planning, preparation, initiation or waging of a war of aggression", or "participation in a common plan of conspiracy",[122] and the like. The fact that for all these acts, whether committed singularly, in groups or as members of some organisations, the individuals, at the ultimate analysis, are held responsible.

Part III of the Charter (Articles 14 and 15) required each signatory to appoint a Chief Prosecutor "for the investigation of the charges against and the prosecution of major war criminals".[123] The four Prosecutors shall act as a Committee to distribute the work between themselves, settle the list of accused, prepare and present an Indictment, and submit suggested rules of procedure to the Tribunal. Part IV (Article 16) dealt with the procedure "to ensure fair trial for the Defendants".[124] Part V (Article 17-25) laid down certain provisions for the conduct of the trial and the powers of the Tribunal. This is rather the most technical part of the Charter. The next part, that is, Part VI (Article 26-29) dealt with the Judgment and Sentences to be imposed by the Court, whereas the last part, that is, Part VII (Article 30) says about the expenses of the trial.

---

122. Ibid.
123. Article 14 of the IMT Charter.
124. Ibid., Article 16.

The Tribunal at Nuremberg

The establishment of the International Military Tribunal at Nuremberg was an unprecedented historical achievement in the field of war trials. The master craftsmanship of the IMT lies in the fact that it could bring to the limelight many controversial issues concerning war crimes and make definite attempts to resolve them. It was, therefore, "a monumental undertaking judged by all legal standards".[125]

An indictment against 24 major German war criminals and six groups or organisations was lodged with the International Military Tribunal at Berlin on October 18, 1945.[126] After receiving the indictment, the Tribunal moved to Nuremberg. On October 25, 1945, Robert Ley, the defendant, committed suicide. On November 15, 1945, the Tribunal ruled that the trial of Gustav Krupp von Bohlen und Halbach, shall be postponed indefinitely because of his serious physical and mental illness. Twenty-two men were, therefore, tried in total. Martin Bormann, who was not in the custody

---

125. Woetzel, op. cit., p. 2.

126. A common indictment for twenty-three nations, including the four major Powers, was presented to the Tribunal. This includes nineteen other nations, who subscribed to the principles of the Charter.

of the Tribunal, was tried in absentia.[127] The defendant groups and organisations were the S.S. and the S.D., the S.A., the Gestapo, the Leadership Corps of the Nazi Party, the Reich Cabinet, and the General Staff and High Command of the German Armed Forces.

The trial opened on November 20, 1945. Final arguments were concluded on August 31, 1946. The Tribunal rendered its Judgment on September 30 and October 1, 1946.[128]

The nations conducting the trial were the United Kingdom, the United States of America, the French Republic, and the U.S.S.R. The defendants were a cross-section of German statesmen, bankers, administrators, industrialists, military leaders, educators, and propagandists selected by the Committee of the Chief Prosecutors of the four Powers which established the Tribunal.

---

127. The other defendants were Hermann Wilhelm Goering, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Hans Frank, Wilhelm Frick, Alfred Rosenberg, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyss-Inquart, Rudolf Hess, Walter Funk, Erich Raeder, Baldur von Schirach, Albert Speer, Constantin von Neurath, Karl Doenitz, Hjalmar Schacht, Franz von Papen, and Hans Fritzsche.

128. Maugham, op. cit., pp. 50-51.

The judges in the trial were Sir Geoffrey Lawrence[129] (later Lord Oaksey), representing the United Kingdom,[130] who was elected Chairman of the Tribunal; his alternate, Sir William Norman Birkett[131] (later Lord Birkett); Mr. Francis Biddle,[132] representing the United States, and his alternate, Judge John J. Parker;[133] M. le Professeur Donnedieu de Vabres,[134] representing France, and his alternate, M. le Conseiller Falco;[135] and Major-General I.T. Nikitchenko, representing the Soviet Union, and his alternate, Lt.-Colonel A.F. Volchov.

The prosecution was in the hands of Mr. Justice Robert H. Jackson, Chief of Counsel for the U.S.A.; Sir Hartley Shawcross,[136] Chief Prosecutor for the United Kingdom;

---

129. A member of the British Court of Appeal; See Calvocoressi, op. cit., p. 17.

130. British Members were appointed by the Lord Chancellor.

131. A Judge of the High Court.

132. A former Attorney-General of the United States.

133. A Judge of the Circuit Court of Appeals for the Fourth Circuit.

134. A Professor from the Sorbonne.

135. From the Cour de Cassation.

136. Sir Hartley Shawcross, K.C.,M.P.,was the Attorney-General. He could not attend the Trial for any length of time. He delivered an opening and a closing speech for the United Kingdom, but for most of the time he was compelled by his manifold other duties to follow the trial from a distance. The actual conduct of the case for the British devolved therefore on Sir David Maxwell-Fyfe, K.C., M.P.,who, as Attorney-General in Mr. Winston Churchill's caretaker government of the Summer of 1945, had been closely connected with the trial from its earliest embryonic stages; See Calvocoressi, op. cit., p. 18.

M. Francois de Menthon,[137] Chief Prosecutor for the French Republic; and General R.A. Rudenko, Chief Prosecutor for the U.S.S.R. By Agreement between the four Chief Prosecutors, America was to deal with the so-called common plan or conspiracy, Britain with the crimes against peace, the U.S.S.R. and France with War Crimes and Crimes against Humanity in East and West respectively.

The trial was conducted in four languages simultaneously: English, German, Russian, and French.

The Tribunal held 403 open Sessions. For the Prosecutors thirty-three witnesses appeared. The Prosecutors also put in evidence over 4,000 documents. On the other hand, for the defence, a total of sixty-one witnesses in addition to nineteen defendants appeared. Further 143 witnesses for the defence, gave evidence by means of written answers to interrogatories, and some thousands of others gave evidence by affidavits for the defence.[138]

Against the indicted criminal organisations, the prosecution introduced 101 witnesses, 1,809 affidavits and six reports. For the defence of these groups there were

---

137. M. Francois de Menthon who, on leaving Nuremberg to enter the French Cabinet, was succeeded by M. Champetier de Ribes (later President of the Council of the Republic); See Calvocoressi, op.cit., p. 19.

138. Maugham, op.cit., pp.50-51; Woetzel, op.cit., p.2.

twenty-two witnesses, and 1,36,213 affidavits for the S.S., 7,000 for the S.D., 10,000 for the S.A., 38,000 for the Political Leaders, 3,000 for the General Staff, and 2,000 for the Gestapo. The affidavits and reports in the cases of criminal organisations were introduced before hearing Commissioners who reported to the Tribunal. The reported evidence in the trial comprises twenty-four printed volumes and seventeen additional volumes of documents.[139]

In the Indictment lodged against the twenty-two[140] defendants, there were four Counts. These counts briefly stated are - (1) Common plan or conspiracy to wage wars of aggression, (2) Crimes against Peace, namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, (3) War Crimes, and (4) Crimes against humanity. Out of the twenty-two men tried by the Tribunal, three were acquitted by a majority of the Court, while nineteen were convicted. However, the accused individuals and organisations were liable for prosecution for crimes committed under these

---

139. Woetzel, op. cit., pp. 2-3.

140. Originally there were twenty-four defendants, but later, due to the suicide committed by Ley, and insanity of Gustav Krupp, the total number of defendants subsequently was reduced to twenty-two.

categories between 1939 and 1945. The Tribunal declared three of the indicted organisations to be criminal as to those who became or remained members after September 1,1939.

Other Methods of Proceedings

A number of alternative methods of proceeding against war criminals were open to the Allies in 1945, but they deliberately choose to set up an International Military Tribunal. The alternative methods open to them mainly were: they could have done nothing at all; they could have handed the entire problem to the Germans themselves; they could have tried to assemble a court of neutral judges; or, they could have themselves taken summary executive action, instead of adopting the more difficult methods of legal proceedings.[141] The method of 'doing nothing' is inexcusable, whereas the method of summary or executive action, which can not establish peace through the Rule of Law, has too been disapproved by modern international law. Both these methods are discussed earlier in detail. To hand over the problem of trial to the Germans, immediately reminds the 'injudicial farce' of the Leipzig trials.[142] The remaining alternate method was to organise a court of the neutral judges for the trial of the war criminals was, however, left. It was a difficult task because, no such court existed

---

141. Calvocoressi, op.cit., p. 19.
142. Details of the Leipzig trials have been discussed earlier in this Chapter.

in the past; the whole concept of neutrality has changed and, therefore, impartiality is no longer a rigid qualification of neutrality. At present, a State remains neutral, if it is allowed to remain so by the belligerents, and it is immaterial whether it wants or feels to remain neutral. So, the idea of a court of the neutral judges, could not be accepted by the Allies. Of course, the idea of including some neutral judges or some German judges in the Tribunal, as suggested by many writers, and which might have saved the Tribunal from the charge of partiality, is rather controversial one. It is said as a reply that, the judgement is more important than the judges, if it can ensure the fair conduct of the trial, makes an objective study of the evidence, and passes sentences warranted by the evidence.[143]

Nature of the IMT

The IMT was an ad hoc court, because it was established for a specific purpose of trying a specific class of German war leaders, and when this task was over, it ceased functioning.[144]

The question, therefore, arises whether the IMT was a military tribunal or not, particularly when the majority

---

143. Calvocoressi, op.cit., pp.20-21; Also see Woetzel, op. cit., p. 45.

144. Woetzel, op. cit., p. 40.

of judges were civilians. Though the main hostilities ended in Germany after the war, sporadic unrest was created by the "Werwolf" organisations which, it was said, required military occupation. Therefore, the IMT was not a regular military tribunal under the rules of belligerent occupation, it was a special military tribunal instituted under a form of military occupation prevailing in Germany at the time.[145]

The most important question regarding the IMT, which is also connected with its legal character, is that how far the IMT could be international? Various arguments are put forth about the character of an international court. The argument that a court is international if it applied international law and judged international crimes is untenable, because sometimes national, civil, and military tribunals also apply international law and judge international crimes.[146]

The argument that an international court is one that is based on powers of occupation is too, not very convincing because the occupation court has limited jurisdiction; it can not prosecute crimes which are acts of state, neither it can set aside the territoriality principle of jurisdiction.[147]

---

145. Ibid., p. 40-41.

146. Woetzel, op. cit., p. 42.

147. Ibid., p. 42.

Another argument that a tribunal can be international if its basis is a treaty or an international agreement and is not the organ of any one state, appears more realistic. But the objection, that a tribunal can not be considered international and binding on states, which were not contracting parties to the treaty or agreement that forms its basis, is also equally valid.[148] It was, therefore, suggested that the word "International" be replaced by the word "Inter-Allied" Military Tribunal.[149]

The argument that a court can be considered international, if the representatives of several nations took part in conducting the trial, has been widely objected to on moral and political grounds.[150] Similarly the argument that a basis for the international character of a court can be found in the principles of natural law is extremely speculative and vague.[151] Also the argument, that a court can be considered international, if it has the power to declare principles of international law, opens new controversies regarding the inherent attributes of internationality.[152]

---

148. Ibid., pp. 42-43.

149. The British Memorandum of May 28, 1945, concerning the American draft of the London Agreement, suggests the appellation "Inter-Allied" instead of "International Military Court". The same description is found in Justice Jackson's Memorandum of June 6,1945, and General Nikitchenko refers to the IMT as a "temporary Inter-Allied organisation". See Woetzel,ibid.,p.43.

150. Woetzel, op.cit., p. 43.

151. Ibid., p. 46

152. Ibid., p. 47.

Since there is no permanent international criminal court, neither a central legislative authority for the family of nations, therefore, a tribunal set up by several States through a treaty and with powers over the affairs and persons within their respective sovereign spheres of jurisdiction, or a court instituted by one or a group of nations with the consent and approval of the international community, are the only kinds of international court possible today.[153]

Subsequent Proceedings

In pursuance with the Moscow Declaration of October 30, 1943, the four Allied Powers decided to establish a legal basis in Germany for the trial of war criminals and other offences not dealt with by the IMT. The Control Council of Germany, being after the capitulation the sole legislative authority in Germany, proceeded to enact on December 20, 1945, Law No. 10, "for the punishment of persons guilty of War Crimes, Crimes against Peace and Crimes against Humanity".[154] The four occupying Powers had separate zones in Germany, and they adopted their own method of ascertaining, bringing to trial, and trying the

---

153. Ibid., pp. 48-49; For an important discussion on the international character of a court. See Anand, R.P., Studies in International Adjudication, Vikas Publications, Delhi, 1969, pp. 107-113.

154. Maugham, op. cit., p. 87.

persons in their Zone, believed to be guilty of War Crimes as defined afresh in their Zone.[155] The definitions of crime in the four Zones were in some respects very widely different.

President Truman by Executive Order No. 9547 of May 2, 1945, and by Executive Order No. 9679 of January 16, 1946, enlarged the powers conferred on the Chief of Counsel, and the Representative of the United States respectively, to include "authority to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against of groups and organisations declared criminal" by the IMT at Nuremberg. The Representative and Chief of Counsel were authorised to designate a Deputy Chief of Counsel for organising, planning and conducting the prosecution of charges of atrocities and war crimes other than those, then being prosecuted in the IMT. Brigadier-General Telford Taylor[156] out of hundreds of thousands of men guilty according to Law No. 10, selected 185 cases.

---

155. Ibid., p. 19.

156. A clear-headed U.S.A. Soldier, and the Chief of Counsel for War Crimes; See Ibid., p. 20.

Twelve trials[157] under Control Council Law No. 10 before the Tribunals set up in Nuremberg under Ordinance No. 7 were held during the years 1946-1948. They were often referred to as "Nuremberg trials", or better as the "subsequent proceedings" to distinguish them from the IMT at Nuremberg.

There were thirty-two American Judges and some Alternate Judges in all those Tribunals. The first trial opened on December 9, 1946, and the Judgment was delivered on August 20, 1947, whereas, the last began on February 4, 1948, and Judgment was pronounced in April, 1949. In all, there were more than 1,200 days of court proceedings, the transcript of which exceeds 330,000 pages, excluding hundreds of documents and records.

As the result of the trials, 142 men were convicted and of these, twenty-six were sentenced to death, two of whom had their sentences reduced on review to life imprisonments. Of the 118 defendants convicted but not condemned to death, thirty-six were sentenced to imprisonment for

---

157. Some of the important cases tried were the "Farben Case", the "Krupp Case", the "Ministries Case", and the "High Command Case". In these cases crimes against peace were involved. In six of the other cases "slave labour" charges played an important part. The unlawful execution of "Hostages" was the central charge in the "Hostage Case". See Maugham, op. cit., pp. 93-98.

periods varying from four years to life and others for lesser periods.[158] The average sentence was about ten years.

In the British Zone, the suspected criminals were tried under a Royal Warrant dated the 14th June 1945, for "violations of the laws and usages of war". Like the Charter of the IMT or like Law No. 10, "Crimes against Peace" and "Crimes against Humanity" did not figure in the Jurisdiction of the British Military Courts in the British Zone. Certain persons, however, were charged before Control Commission Courts for "Crimes against Humanity" committed against Allied nationals. There were also a number of persons charged before German Courts with crimes committed against German nationals or stateless persons.

The figures of persons tried in the British Zone[159] were stated by the Under-Secretary of State for Foreign Affairs on March 28, 1949, in reply to a parliamentary question, to have been as follows :

---

158. The trials and the judgments are summarised by Brigadier-General Telford Taylor (Chief of Counsel for War Crimes), "The Nuremberg War Crimes Trials", International Conciliation, No. 450, April, 1949, pp. 243-371; also reprinted in "Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10", Brigadier-General Telford Taylor, Washington, D.C., August 15, 1949.

159. Quoted in Maugham, U.N.O. and War Crimes, op.cit., p.21.

1. War Crimes

Persons charged before British military tribunals with crimes against the laws and usages of war.	..	937
Acquitted ..	..	260
Sentenced to death ..	..	230
Sentenced to life imprisonment	..	24
To shorter terms of imprisonment	..	423

2. Crimes against Humanity

(a) Persons charged before Control Commission courts with crimes committed against Allied Nationals	..	148
Acquitted ..	..	88
Sentenced to death ..	..	10
Sentenced to life imprisonment	..	None
Sentenced to shorter terms of imprisonment		50
(b) Persons charged before German Courts with crimes committed against German nationals or stateless persons	..	2,180
Acquitted ..	..	866
Sentenced to death ..	..	4
Sentenced to life imprisonment	..	None
Sentenced to shorter terms of imprisonment		1,249
Fined		61

Non-Nuremberg Trials

Some other war crimes cases were also tried in Germany by the United States, a few being tried at first by

Military Commissions, the balance being tried by specially appointed Military Government Courts. These cases are sometimes referred to as the "Conventional war crimes cases" or the "non-Nuremberg cases". They were the responsibility of the "Theater Judge Advocate", later designated as the "Judge Advocate, European Command".

Some of the interesting cases tried were described by the Deputy Judge Advocate for War Crimes, European Command,[160] (DJAWC), as follows :

Hadamar Murder Factory Case (United States v. Klein, et al., opinion DJAWC, February 1946, Case No. 12-449), in which the accused were charged with killing several hundred nationals of other United Nations in the course of the operation of an euthanasia institution.[161]

Malmedy Massacre Case (United States v. Bersin, et al., opinion DJAWC, October 1947, Case No. 6-24) in which 73 members of Combat Group Peiper, a unit specially organised from elements of 1st SS Panzer (Adolf Hitler) Division, killed several hundred surrendered American prisoners of war during the Ardennes Offensive in December 1944. This was

---

160. Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944 to July 1948, Legal and Judicial Affairs, pp. 46-49.

161. Ibid., pp. 46-49.

in accordance with instructions given by Hitler during a two-hour speech at Bad Nauheim to his highest officers on the western front, including General Dietrich, Commanding General of the Sixth Panzer Army and who was one of the accused, to prosecute the counter offensive by applying such terrorism as to spread fear and panic among the United States Forces.[162]

Superior Orders Case (United States v. Stroop, et al., opinion DJAWC, September 1947, Case No. 12-2000), involving the execution of a common design to kill surrendered American airmen throughout Wehrkreis XII. The accused ranged from Lieutenant General Stroop, Higher SS and Police Leader of Wehrkreis XII, down to and including the triggermen in several incidents of such illegal killings.[163]

The other cases tried were : the Russelheim Case (United States v. Hartgen,et al., opinion DJAWC, September 1945, Case No. 12-1497); the Dachau Case (United States v. Weiss, et al., opinion DJAWC, March 1946, Case No. 000-50-2); the Mauthausen Case (United States v. Altfuldisch, et al., opinion DJAWC, February 1947, Case No. 000-50-5); the Flossenburg Case (United States v. Becker, et al., opinion

---

162. Ibid., pp. 46-49.

163. Ibid., pp. 46-49.

DJAWC, May 1947, Case No. 000-50-46); the Buchenwald Case (United States v. Waldeck, et al., opinion DJAWC, November 1947, Case No. 000-50-9); and the Nordheusen Concentration Camp Case (United States v. Andree, et al., opinion DJAWC, April 1948, Case No. 000-50-37).[164]

War Crimes committed by Germans were also tried in German Courts in the United States Zone. In one case, a former presiding judge was tried and sentenced to four and one-half years' imprisonment, for having sentenced to death two persons, one of them a Catholic priest, for participation in a peace demonstration. This was the first case, in which a former regular member of the German judiciary had been tried for participating in his official capacity in a Nazi Crime. Several other cases were also tried by the German Courts.[165]

Similar trials of war criminals committing crimes against United States nationals were held before the United States Military Courts of Commissions in Austria. Fourteen cases were tried involving 52 persons, of whom 16 were acquitted. Upon review, 4 death sentences, 6 sentences of life imprisonment, and 26 sentences of terms of years at

---

164. Ibid., pp. 46-49.

165. Office of Military Government for Germany (U.S.), Legal and Judicial Affairs, Report of the Military Governor, 1 September 1947, - 31 August 1948, pp. 11-12.

hard labour were confirmed. The programme was completed in November 1947.

In Italy, United States Military Tribunals tried 14 war criminals, in 9 cases. Eleven convictions were were obtained and seven death sentences were imposed. Moreover, in Italy, Kesselring and others were tried under separate British warrants.

A large number of German Generals, members of groups and civilian officials were also tried in Belgium, Denmark, Italy, Greece, Holland, Norway, Poland, Yugoslavia and Russia for atrocities committed in those countries while in German occupation. Hundreds of other trials were conducted by national tribunals in Europe. Trials were also held in the Far East against Japanese officers and men for atrocities and other war crimes.

The Tokyo Trial

An important war trial, after the Second World War, in the Far East, was the trial of Japanese war criminals at Tokyo, held under a special Charter. This is, usually, known as the "Tokyo Trial".

The "Proclamation Defining Terms for Japanese Surrender" of July 26, 1945, also referred to as the "Potsdam Declaration",[166] was the controlling document for

166. See 23 U.S. Department of State Bulletin, 1952, p. 137 et seq.

the occupation of Japan. It was approved by the United Kingdom, the Republic of China, the Soviet Union, and the United States. This Proclamation expressed the basic policy for the trial and punishment of the Japanese war criminals. Further, the Japanese Representatives, acting for the Emperor of Japan, accepted this Proclamation by the Instrument of Surrender, signed on September 2, 1945.

On January 19, 1946, General MacArthur, the Supreme Commander for the Allied Powers (SCAP) in Japan, issued a Proclamation establishing an International Military Tribunal for the Far East.[167] The very same day, by General Order No.1, he approved the Charter of the Tribunal, and pursuant to which, on February 15, 1946, he appointed Judges of the Tribunal.

The Far Eastern Commission, sitting at Washington, on April 3, 1946, adopted a general policy decision[168] on the "Apprehension, Trial and Punishment of War Criminals in the Far East". After this, the Supreme Commander, on April 26, 1946, issued General Order No. 20[169] which

---

167. General Headquarters Supreme Commander For The Allied Powers, "General Orders No.1," January 19, 1946, U.S. Department of State Publication No. 2675, pp. 5-10.

168. U.S. Department of State Bulletin, No. 418, July 6, 1947, pp. 35-36.

169. General Headquarters Supreme Commander For The Allied Powers, "General Orders No.20", April 26, 1946, U.S. Department of State Publication No. 2675, pp. 11-16.

specifically superseded General Order No. 1, and incorporated the requirements of paragraph 5(b) of the policy decision in regard to the membership of international courts appointed by him which differed from the provision as to membership set forth in General Order No. 1. The amended Charter of the Tribunal,[170] as contained in General Order No. 20, is similar in many respects, with the Charter of the IMT at Nuremberg.

An indictment against 28 major Japanese war criminals was lodged with the International Military Tribunal for the Far East (IMTFE) on April 29, 1946. On May 3 and 4, 1946, formally the indictment was read in open court. The prosecution opened its case on June 3, 1946. Closing arguments and summations of prosecution and defence closed on April 6,1948. The Judgment of the Tribunal was pronounced on November 4-12, 1948.

Two of the accused, Matsuoka and Nagano, died during the trial. Another accused Okawa, was declared unfit to stand trial and unable to plead for his insanity; proceedings against him were, accordingly suspended. The Accused were

---

170. For the text of the Charter as amended, see "Trial of Japanese War Criminals", U.S. Department of State Publication No. 2613, Far Eastern Series 12, 1946, p. 39; Also see, Survey of International Affairs, 1939-1946, Royal Institute of International Affairs, Oxford, "The Far East 1942-1946", pp. 536-540.

indicted on one or more of fifty-five different counts.[171] But none of the accused were acquitted on all counts. All except two defendants were found guilty of the Charge of conspiring to wage aggressive war.[172]

The accused included such prominent persons as the Emperor's Chief war-time advisor Koichi Kido, the former Prime Ministers, Tojo, Koiso, and Hirota, and Ultra-nationalists and militarists such as Matsuoka, Araki, Itagaki, Matsui, Dohihara, and Hashimoto. The Prosecution presented its case in twelve phases, which covered the main steps by which Japan had obtained hegemony over Greater East Asia.[173]

As defined in its Charter, the Tribunal had power to try those leaders of Japan who, from January 1, 1928, to September 2, 1945, had committed "Crime against Peace... Conventional War Crimes, (and) Crimes against Humanity". The Tribunal was composed of members from those countries which had signed the Surrender Instrument, together with

---

171. For Indictment see, "Trial of Japanese War Criminals," U.S. Department of State Publication No. 2613, Far Eastern Series 12, 1946, p.45.

172. See Survey of International Affairs, op. cit., The Far East 1942-1946, pp.408-409. For the final judgment at Tokyo, see Chapter IV.

173. Ibid., p. 408.

India and the Republic of the Philippines. Although the Tribunal could determine its own rules of evidence, it adopted most of the normal procedures which ensure a fair trial, such as the necessity for an indictment and the right of the accused to be represented by a Counsel and to be allowed to present a defence.[174]

The records of the Trial cover more then 47,412 pages of transcript, whereas the final judgment runs over 1,200 pages of text and some 300 pages of appendices. The material of the Trial were divided into Proceedings and Exhibits for both the Prosecution and the Defence.[175]

The Judges who represented in the Tribunal were: Honourable Mr. Justice W. Stuart McDougall (Dominion of Canada), Hon. Lord Patrick (United Kingdom of Great Britain and Northern Ireland), Hon. Sir William Flood Webb (Commonwealth of Australia and President of the Tribunal), Hon.Mr. Justice Erima Harvey Northcroft (Dominion of New Zealand), Hon. Mr. Justice R.B. Pal (Government of India), Hon. Mr. Justice B. Roling (The Kingdom of the Netherlands), Hon. Mr. Justice Cramer (The United States of America), Hon. Mr. Justice Ju-ao-mei (The Republic of China), Hon.Mr. Justice Zaryanov (The Union of Soviet Socialist Republics),

---

174. Ibid., p. 408.

175. Ibid., See Footnote, p. 408.

Hon. Mr. Justice Henry Bernard (The Republic of France), and Hon. Mr. Justice Jaranilla (The Commonwealth of Philippines).

There were no alternates for the judges as it was in Nuremberg.[176] The responsibility for investigation and prosecution rested completely with the Chief of Counsel, appointed by the Supreme Commander of the Allied Powers. The Associate Counsel, which were designated by the other nations participating in the trial, had the duty to assist him. The Supreme Commander's role was very significant throughout the trial, and Horwitz comments, therefore, that "For the first time eleven nations had agreed in a matter other than actual military operations to subordinate their sovereignty and to permit a national of one of them to have final direction and control."[177]

Charter of the International Military Tribunal for the Far East

The Charter of the International Military Tribunal for the Far East (IMTFE) as amended, contained seventeen Articles altogether, divided into five parts. The First Part

---

176. For a brief comparison between the IMT at Nuremberg and at Tokyo see, Woetzel, Robert K., "The Nuremberg Trials in International Law", op.cit., pp.226-232.

177. For an important Survey of the IMT at Tokyo, see Solis Horwitz, "The Tokyo Trial", International Conciliation, No. 465, 1950, pp. 474-484.

(Article 1-4) dealt with the constitution of the Tribunal. Article 1 provided that the Tribunal is established "for the just and prompt trial and punishment of the major war criminals in the Far East."[178] Article 2 provides, "The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines". Article 3 related to "Officers and Secretariat", including the designation and functions of the President, Secretaries, and other staff members of the Tribunal. Article 4 provided for the "Convening and Quorum, Voting and Absence" procedures of the Tribunal. Part II of the Charter (Article 5-8) dealt with the "Jurisdiction and General Provisions". Article 5[179] read as follows :

"Article 5. Jurisdiction over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organisations are charged with offences which include Crimes against Peace.

---

178. Article 1 of the IMTFE Charter.

179. Article 5 of the IMTFE Charter; For the complete text of the amended Charter see, "Trial of Japanese War Criminals", U.S. Department of State Publication No. 2613, Far Eastern Series 12, 1946.

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

"(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

"(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."[180]

---

180. For the complete text of the Charter see, Survey of International Affairs, 1939-1946, Royal Institute of International Affairs, Oxford, "The Far East 1942-1946", pp. 536-540.

Article 6 provided that the plea of superior order or official position shall not free the accused, but "may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[181] Article 7 of the Charter dealt with the "Rules of Procedure" and Article 8, with the designation and functions of the Chief of Counsel and Associate Counsel.

Part III of the Charter (Article 9-10) pertained to the "Fair Trial for Accused". Article 9(a) read in part provides " Each accused shall be furnished, in adequate time for defence, (with) a copy of the indictment, including any amendment and of this Charter, in a language understood by the accused".[182] Article 9(b) dealt with the language of the Trial which shall be English and the language of the accused, and clause (c) of the same Article provides for a Counsel for each accused. Clause (d) of Article 9 gives each accused the right to conduct his defence, to examine any witness, subject to the restrictions determined by the Tribunal.

Part IV of the Charter (Article 11-14) pertained to the "Powers of Tribunal and Conduct of Trial". Article 11 of this Part provided the Powers to the Tribunal to summon witnesses, to interrogate the accused, to require the

---

181. Article 6 of the Charter of the IMTFE.
182. Article 9(a) of the Charter of the IMTFE.

production of documents and other evidentiary material, to require of each witness an oath or affirmation, and to appoint officers. Provisions for an expeditious conduct of Trial were incorporated in Article 12, including the provision to "Determine the mental and physical capacity of any accused to proceed to trial".[183] Article 13 of the Charter provides for the detailed rules for the admissibility, relevance, specific evidences admissible, judicial notice, Records, Exhibits and Documents, which are connected with the Evidentiary procedure of the Tribunal. Article 14 dealt with the place of trial and Article 15 with the "Course of the Trial Proceedings". The last Part (Part V, Article 16 and 17) provided for the "Judgment and Sentence". Article 16 empowered the Tribunal to impose death or any other punishment upon an accused, in case of conviction. Whereas the last Article of the Charter (Article 17) read as follows :

"Article 17. Judgment and Review: The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander

---

183. Article 12(d) of the Charter of the IMTFE; The trial of Okawa, one of the accused, was suspended on this ground.

for the Allied Powers, who may at any time reduce or otherwise alter the sentences except to increase its severity."[184]

Although in many respects the Tokyo Tribunal and the Charter followed the Nuremberg precedent, yet it maintained its originality and uniqueness in various other aspects of the Charter, composition of the Tribunal, and particularly, in its Judgment.[185] All the way, the Nuremberg principles acted as guidelines for all the future trials including the Tokyo Trials.

It is interesting to note, however, that out of the eleven members of the Tribunal at Tokyo, only eight fully supported the judgment and the verdicts. Again, two of the eight, the President of the Tribunal and Justice Jaranilla (Philippines), filed short concurring opinions elucidating their views on specific problems. Justice B. Roling (the Netherlands) filed a separate opinion, concurring in part and dissenting in part. Justice Pal (India) filed a dissenting opinion as lengthy as the

---

184. M. Shigemitu was released on parole under General MacArthur's (SCAP) clemency regulation on November 21, 1950. He had served four years of the seven years of imprisonment to which he was sentenced; See Maugham, U.N.O. and War Crimes, op. cit., note 1, p. 101.

185. For a systematic comparison between the IMT, Nuremberg and the IMTFE, Tokyo, see Woetzel, op.cit., pp. 226-232.

majority judgment. Justice M.H. Bernard (France) dissented for special reasons. These dissenting notes and opinions are further elaborated in Chapter IV of this work.

Other Trials of Japanese Nationals

Japanese war crimes suspects were classified as "A", "B", and "C" suspects, these designations referring to the categories of crimes described in paragraph 1 of the Far Eastern Policy Decision of April 3, 1946: "A" to aggressive war charges, "B" to conventional war crimes or violations of the laws of war, and "C" to "Crimes against Humanity".[186] The International Military Tribunal for the Far East tried only cases of "A" charges.

Majority of the war trials conducted in Japan on "B" and "C" charges were tried before United States Eighth Army Military Commissions in Yokohama. Certain other trials of such charges were conducted until May, 1947, by U.S. Army Commissions in Manila. Thereafter, Japanese nationals tried for war crimes in the Philippines appeared before Philippine Government Tribunals.[187]

On October 27, 1948, General Headquarters, SCAP, by General Orders No. 13, to implement the policy decision

---

186. Whiteman Marjorie, M.; Digest of International Law, Vol. 11 (1968), pp. 998-999.

187. Whiteman, op. cit., p. 1003.

of the Far Eastern Commission, established Military Tribunals for the trial of Japanese war criminals.

Pursuant to General Order No. 13, on October 27, 1948, by Special Order No. 1, two Tribunals were appointed, the one composed of U.S. Army Officers with an Australian Army officer as President; the other, composed of U.S. Army officers and two civilian members, one a United States national, the other a Chinese national. Former Admiral Soemu Toyoda, Commander in Chief of the Japanese Combined Fleet from May 1944 to May 1945, and ex-Lieutenant General Hiroshi Tamura, Director of the Japanese Prisoner of War Management Bureau and of the Prisoner of War Information Bureau, both former class "A" suspects were arraigned before the two Tribunals respectively, on "B" and "C" charges. These trials were described as "the first war crimes trials on a General Headquarters level", and "the GHQ Commission appointed to hear the Tamura case will be the first in Japan to contain civilians."[188] Tamura was sentenced to 8 years at hard labour and upon review by SCAP, the sentence was approved.

An Information Bulletin issued by the Public Information Office of General Headquarters, SCAP, on October 19, 1949, said: "Since the surrender some 4,200 Japanese have

---

188. Press Release issued on October 27, 1948, by the Public Information Office, General Headquarters, SCAP., See ibid., p. 1004.

been convicted of war crimes. More than 700 have been executed. Approximately 2,500 are serving terms ranging up to life in prisons throughout the Orient. Hundreds found guilty of comparatively minor offences are free, having completed their sentences."[189]

The executions and sentences resulted from verdicts returned in some 2,000 separate or group trials by American, Australian, British, Chinese, Dutch and French Military Tribunals.[190]

The Eichman Trial

The latest in the series of war trials worth mentioning, is the trial of Adolf Eichman,[191] which began in the District Court of Jerusalem on April 11, 1961, and continued until August 14, 1961. The indictment contained 15 counts including crimes against the Jewish people by participation in the "Final Solution" (extermination), crimes against humanity, war crimes and membership of enemy organisations. Eichman was appointed as the Head of the Department IV B4 of the Gestapo, in charge of "Jewish affairs and Evacuations" in June 1941, and committed various inhuman crimes including the crimes of Genocide.

---

189. Whiteman, Digest of International Law, op. cit., p.1005.

190. Ibid., pp. 1005-1006.

191. See International Law Reports, Vol. 36 (Ed. E.Lauterpacht), London, 1964, pp. 20-79, and 253-272.

On May 11, 1960, he was found and removed from Buenos Aires, Argentina, where he had been living since 1950 under some assumed name, by the members of the Israel Secret Service.[192] Ultimately Eichman was sentenced to death by the District Court of Jerusalem.

To sum up, all the preceding paragraphs discussed so far, it may be observed that War trials are the inevitable course of action left for the trial and punishment of the war criminals today. As Akehurst puts it that war trials "are another means of forcing states to obey the laws of war".[193] Decisions of various Tribunals indicate that the verdicts in war trials ranges from acquittal to death sentences. But the question is, how can the gravity of such crimes be determined? Further, the question is, how can the individuals be held responsible for these charges and whether these charges or crimes are recognised in international law? These questions are discussed in the next Chapter.

---

192. Official Records, U.N. Security Council, 15th Year, Supplement, April, May and June 1960, p. 27.

193. Akehurst, Michael, A Modern Introduction to International Law, George Allen and Unwin Ltd., London, Minerva Series, 1970, p. 332.

CHAPTER II

CHARGES AND THEIR LEGAL BASES

Changing Concept of "Crime" in International Law

The concept of "Crime" in international law, has undergone changes during the twentieth century, particularly after the Nuremberg and Tokyo Trials. It has acquired new meaning and wider jurisdiction. For example, "Under the traditional law the full acceptance of the illegality of war would have led to the conclusion that the state which waged war would be guilty of an illegal act; under the current development it is the individual who is held to have committed an internationally criminal act. The traditional system would have put the burden on the state to restrain the individual, whereas the precedent of the war trials suggests that pressure in the form of fear of punishment would be put on individuals to restrain the state".[1] Similarly "the term "War Crime" has been used in military circles as synonymous with "violation of the law of war" but in current official and juristic discussions it has acquired a wider connotation".[2] However, what acts should be classified as crimes under international law in the last analysis is

---

1. Jessup, Philip C., A Modern Law of Nations - An Introduction. The Macmillan Company, New York, 1950, pp.161-162.

2. Wright, Quincy, "War Criminals", American Journal of International Law, (Supplement), Vol. 39, 1945, p.260.

intimately connected with the question of the machinery by which such acts should be dealt with. Hence, there is diversity of views on an analytical classification of crimes and on the machinery for their punishment.

Although traditional international law has recognised certain acts as crimes, such as, piracy, destruction of cables, trade in slaves, women, children, narcotics and pornographic literature, counterfeiting of currency and the like. Yet, as Hudson puts it, "only in quite recent times have official attempts been made to borrow the concept of criminality from Municipal Law for International Law purposes".[3]

Article 6 of the Charter of the International Military Tribunal at Nuremberg provided for a catalogue of crimes, grouped under three heads, "Crimes against Peace", "War Crimes", and "Crimes against Humanity". Most of the crimes contained in this Article, it is said, existed in the past, of course, in a different form; certain new crimes were also added. Of course, the Tribunal in its judgment said: "The Charter...is the expression of international law existing at the time of its creation, and to that extent is itself

---

3. Hudson, Manley O., International Tribunals - Past and Future, Washington, 1944, p. 180. And compare Friedmann, W., "The Changing Structure of International Law, Columbia University Press, New York, Second Printing, 1966, pp. 167-168.

a contribution to international law.[4]

The precedent of Nuremberg Charter in enlisting the crimes was followed, more or less, by all other subsequent war trials including the Tokyo Trial. Article 5 of the Charter of the International Military Tribunal for the Far East contained similar provisions for enlisting the crimes with, of course, minor alterations.

For an understanding of the crimes on the basis of which, charges were framed against the accused in the two major "International" trials at Nuremberg and Tokyo, it is necessary to analyse the Indictments presented by the Prosecution in both these trials.

The Crime of Common Plan or Conspiracy

As discussed earlier, Article 6(a) of the Nuremberg Charter dealt with "Crimes against Peace".[5]

Upon analysis, two concepts generally emerge from the list of crimes mentioned in the "Crimes against Peace", and those are: "war of aggression" and "Common Plan or Conspiracy".[6] Both of these concepts, no doubt, are highly

---

4. Trial of The Major War Criminals before the International Military Tribunal, Nuremberg, 1948, Vol. XXII, p. 461 (Hereafter referred to as Trial of The Major War Criminals).

5. Article 6 of the IMT, Nuremberg, Charter. See Chapter I.

6. Article 6(a) of the IMT, Nuremberg, Charter.

sensitive and have resulted in a lot of controversy among the jurists as well as among the authors. Leaving for the time being the questions whether aggressive war or common plan or conspiracy can be a crime under international law, it is necessary to consider the related charges framed against the accused, in the Indictments presented before the Nuremberg, and Tokyo Tribunals.

Count one of the Indictment,[7] prepared and presented by the prosecution, before the International Military Tribunal at Nuremberg, dealt with "The Common Plan or Conspiracy", in pursuance to the Charter, Article 6, especially 6(a). Under the heading, "Statement of the Offence" the Indictment reads:[8]

"All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and, in accordance with the provisions of the Charter are individually responsible for their own acts and for all acts

---

7. Trial of The Major War Criminals, op. cit., Vol. 1, 1947, p. 29.

8. Ibid., Vol. 1, p. 29.

committed by any persons in the execution of such plan or conspiracy. The common plan or conspiracy embraced the commission of Crimes against Peace, in that the defendants planned, prepared, initiated, and waged wars of aggression, which were also wars in violation of international treaties, agreements, or assurances. In the development and course of the common plan or conspiracy it came to embrace the commission of War Crimes, in that it contemplated, and the defendants determined upon and carried out, ruthless wars against countries and populations, in violation of the rules and customs of war, including as typical and systematic means by which the wars were prosecuted, murder, ill-treatment, deportation for slave labour and for other purposes of civilian populations of occupied territories, murder and ill-treatment of prisoners of war and of persons on the high seas, the taking and killing of hostages, the plunder of public and private property, the indiscriminate destruction of cities, towns, and villages, and devastation not justified by military necessity. The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during

the war, and persecutions on political, racial, or religious grounds, in execution of the plan for preparing and prosecuting aggressive or illegal wars, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated".[9]

Part IV of Count one of the Indictment dealt with the "particulars of the Nature and Development of the Common Plan or Conspiracy". Clause "A" of the said part[10] described the "Nazi Party as the central core of the Common Plan or Conspiracy". It said that the Nazi Party viz., the National Socialist German Workers Party, was founded in Germany in 1920, and Adolf Hitler became its Supreme leader (or Fuhrer) in 1921. He continued as such throughout the period covered by the Indictment. The Nazi Party, together with certain of its Subsidiary organisations, became the instrument of cohesion among the accused and their co-conspirators. Each accused became a member of the Nazi Party and of the conspiracy, with knowledge of their aims and purposes at some stage of the development of the conspiracy.

In Clause "B" of Part IV,[11] the Indictment narrated the "Common Objectives and Methods of Conspiracy" of the Nazi Party as follows :

---

9. Ibid., p. 29.
10. Ibid., p. 30.
11. Ibid., pp. 30-31.

"The aims and purposes of the Nazi Party and of the defendants and divers other persons from time to time associated as leaders, members, supporters or adherents of the Nazi Party (hereinafter called collectively the "Nazi Conspirators") were, or came to be, to accomplish the following by any means deemed opportune, including unlawful means, and contemplating ultimate resort to threat of force, force, and aggressive war: (i) to abrogate and overthrow the Treaty of Versailles and its restrictions upon the military armament and activity of Germany; (ii) to acquire the territories lost by Germany as the result of the World War of 1914-18 and other territories in Europe asserted by the Nazi Conspirators to be occupied principally by so-called "racial Germans"; (iii) to acquire still further territories in continental Europe and elsewhere claimed by the Nazi Conspirators to be required by the "racial Germans" as "Lebensraum", or living space, all at the expense of neighboring and other countries. The aims and purposes of the Nazi Conspirators were not fixed or static but evolved and expanded as they acquired progressively greater power and became able to make more effective application of threats of force and threats of aggressive war. When their expanding aims and purposes became finally so great as to provoke such strength of resistance as could be overthrown only by armed force and aggressive war, and not simply by

the opportunistic methods therefore used, such as fraud, deceit, threats, intimidation, fifth column activities, and propaganda, the Nazi conspirators deliberately planned, determined upon, and launched their aggressive wars and wars in violation of international treaties, agreements, and assurances...."

Certain doctrinal techniques were used by the Nazi Leaders to incite others to join in the Common Plan or Conspiracy and to secure the highest degree of control over the German Community.[12] They, therefore, put forth, disseminated, and exploited certain doctrines. For instance: (1) persons of so-called "German blood" were a "master race" and were accordingly entitled to subjugate, dominate, or exterminate other "races" and peoples; (2) war was a noble and necessary activity of Germans; and (3) the German people should be ruled under the Leadership Principle (Fuhrerprinzip) according to which power was to reside in a Fuhrer from whom sub-leaders were to derive authority in a hierarchical order; and the power of the leadership was to be unlimited, extending to all phases of public and private life.

In the next phase[13], the Indictment dealt with the political steps taken by the Nazi Party for acquiring of

---

12. Ibid., p. 31.

13. Count one, Part IV(D) of the Indictment, See ibid., pp. 31-34.

totalitarian control of Germany. After the failure of the 'Munich Putsch' of 1923 aimed at the overthrow of the Weimer Republic by direct action, the Nazi leaders set out through the Nazi Party to undermine and overthrow the German Government by "legal" forms supported by terrorism. They created and utilised, as a party formation, Die Sturmabteilungen (SA), a semi-military, voluntary organisation of the trained young men, committed to the use of violence.

On 30 January 1933 Hitler became Chancellor of the German Republic. After the Reichstag fire of 28 February 1933, clauses of the Weimer constitution guarenteeing personal liberty, freedom of speech, of the press, of association and assembly were suspended.[14] All political parties, except the Nazi Party, were prohibited. Nazi Party became a para-governmental organisation with extensive and extraordinary privileges. Potential internal resistance was exterminated. German Nation was placed on a military footing.

Freedom of popular election was curtailed. The semi-autonomous powers of the federating units were withdrawn. Hitler became the President and the Chancellor of Germany. Independence of the judiciary was restricted; it was utilised to serve the Nazi ends.

---

14. Trial of The Major War Criminals, op. cit., Vol. 1, 1947, p. 32.

To avoid an attack from the German people, a system of terror was established and extended against opponents. Persons were imprisoned without trial. The Nazi Leaders, holding the persons in "protective custody" and concentration camps, subjected them to persecution, degradation, despoilment, enslavement, torture, and murder.[15]

Free Trade Unions were destroyed; their funds and properties were confiscated; their leaders were persecuted and their activities were prohibited. Those trade Unions were supplanted by an affiliated Party organisation. The Leadership Principle was introduced into industrial relations; the entrepreneur became the leader and the workers became his followers. Thus the potential resistance of the workers was frustrated and labor was brought under the control of the Leaders.

Influence of the churches too was subverted because it contradicted the Nazi principles. Priests and clergy were persecuted. Churches were substituted by Nazi institutions, Nazi faiths and beliefs.

Implementing their "master race" policy, the Leaders joined in a programme of relentless persecution of the Jews, designed to exterminate them. Annihilation of the Jews became an official state policy, carried out both by

---

15. Ibid., p. 32.

official action and by incitements to mob and individual violence. The conspirators openly avowed their purpose. For example, the accused Rosenberg stated: "Anti-Semitism is the unifying element of the reconstruction of Germany".[16] On another occasion he stated: "Germany will regard the Jewish question as solved only after the very last Jew has left the Greater German living space... Europe will have its Jewish question solved only after the very last Jew has left the Continent". The accused Ley declared: "We swear we are not going to abandon the struggle until the last Jew in Europe has been exterminated and is actually dead. It is not enough to isolate the Jewish enemy of mankind - the Jew has got to be exterminated".[17] On another occasion he declared: "The Second German secret weapon is anti-Semitism because if it is consistently pursued by Germany, it will become a Universal problem which all nations will be forced to consider." The accused Streicher declared: "The sun will not shine on the nations of the earth untill the last Jew is dead".[18] These avowals and incitements were typical of the declarations of the Nazi Leaders throughout the course of their conspiracy. The programme of action against the Jews included disfranchisement, stigmatization, denial

---

16. Ibid., p. 34.

17. Ibid.

18. Ibid.

of civil rights, subjecting their persons and property to violence, deportation, enslavement, enforced labour, starvation, murder and mass extermination. The extent to which the accused succeeded in the purpose can only be estimated, but the annihilation was substantially complete in many localities of Europe. Of the 9,600,000 Jews who lived in the parts of Europe under Nazi domination, it was conservatively estimated that 6,700,000 have disappeared, most of them deliberately put to death by the Nazi Leaders. Only remnants of the Jewish population of Europe remained.[19]

To cope with their will and preparing the people psychologically for the war, the accused reshaped the education system, trained the youth and introduced Leadership Principle in the schools. Education was supervised by the Party. Vast propaganda machines were created.

German business was used for economic mobilization for Aggressive war. Finance, capital investment, and foreign trades, under the Nazi Leaders and the German industrialists, embarked upon a huge re-armament programme and produced huge war materials to create military potential.

Having Government control, the accused planned to utilise it for foreign aggression. It was alleged that on 7 March 1936, they reoccupied and fortified the Rhineland, in violation of the Versailles Treaty and the Rhine

---

19. Ibid.

Pact at Locarno of 16 October 1925, and yet falsely announced, "We have no territorial demands to make in Europe".[20] Next phase of the Aggressive action was directed against Austria and Czechoslovakia. Specific Plans were made for their acquisition. On 21 May 1935, Hitler in a speech declared that Germany was not interested in Austria. But on 12 March 1938, invasion began and on 13 March 1938, Hitler became the Chief of State of Austria; same day, by law, Austria was annexed to Germany.[21] Similarly, giving false assurances not to attack Czechoslovakia, the Nazi Leaders planned and finally occupied major portions of Czechoslovakia on 15 March 1939, contrary to the Munich Pact.[22]

The next plan was formulated to attack Poland. The German-Polish Pact of 1934 was denounced on false plea and the Danzig issue was stirred up. Ultimately aggressive war was launched against Poland on 1 September 1939.[23]

Then the accused were prepared for an extension of war in Europe. German Armed forces invaded Denmark and Norway on 9 April 1940; Belgium, the Netherlands, and Luxembourg on 10 May 1940; Yugoslavia and Greece on 6 April 1941. All these invasions had been specifically planned

---

20. Ibid., p. 36.
21. Ibid., p. 37.
22. Ibid., p. 38.
23. Ibid., pp. 38-39.

in advance, in violation of the terms of the Kellogg-Briand Pact of 1928.

On 22 June 1941, the Germans denounced the Non-Aggression Pact with the U.S.S.R., and without declaring war invaded the U.S.S.R., and thereby beginning a war of aggression. They destructed towns, cities and villages; demolished factories, collective farms, electric stations, railroads, cultural institutions, museums, schools, hospitals, churches and historical monuments; there was mass deportation of people for slave labour; adults, old, women and children were annihilated, especially the Beilorussians and the Ukrainians; Jews were exterminated.

A German-Italian-Japanese 10-year military-economic alliance was signed at Berlin on 27 September 1940. Finally, Germany declared war against the U.S.A. on 11 December 1941.

The Nazi Leaders carried out their common plan or conspiracy to wage war in ruthless and complete disregard and violation of the Laws and Customs of War and the Laws of Humanity.

For all these crimes, the Indictment held the individuals, mentioned in Appendix A, and also the groups and organisations, mentioned in Appendix B of the Indictment, to be responsible. It stated that the accused are guilty "of a common plan or conspiracy for the accomplishment

of Crimes against Peace; of a conspiracy to commit Crimes against Humanity in the course of preparation for war and in the course of prosecution of war; and of a conspiracy to commit War Crimes not only against the armed forces of their enemies but also against non-belligerent civilian populations".[24]

Count One of the Indictment was patterned after Jackson's declaration[25] (in his June 1945 report) that "Our case against the major defendants is concerned with the Nazi master plan". Mr. Justice Jackson said, what he wanted was to reach "those who planned and whipped up the war", and not "making the entire German people guilty by definition[26]". In effect, the Indictment charged that all the accused, with numerous confederates, engaged in a gigantic "Common plan or Conspiracy" to acquire "totalitarian control of Germany", to mobilize the German economy for war, to construct a huge military machine for conquest, and to overrun and subjugate Austria, Czechoslovakia, Poland, and the other victims of German arms; and, in the course of all the foregoing, to commit numerous war crimes and crimes against humanity.[27]

---

24. Ibid., p. 41.
25. Taylor, Telford, "The Nuremberg War Crimes Trials", International Conciliation, April 1949, No.450, p. 259.
26. For a critical analysis of the crimes, particularly the "Crimes against Peace", see Maugham, Viscount, U.N.O. and War Crimes, John Murray (London), 1951, pp.34-43.
27. Taylor, "The Nuremberg War Crimes Trials", op.cit., p.259.

Crimes against Peace at Nuremberg

Count Two of the Indictment, in pursuance with the Charter, Article 6(a), dealt with "Crimes against Peace".[28] In fact, this Count was very brief, and was almost a reference work. It dealt with in Part V, "Statement of the Offence"; in Part VI, "Particulars of the Wars planned, prepared, initiated and waged"; and in Part VII, "Individual, Group and Organisation's Responsibility for the Offence stated in Count One". In the Statement of the Offence Part, the Indictment stated: "All the defendants with divers other persons, during a period of years preceding 8 May 1945, participated in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances".[29]

Referring to the particulars of the wars, the Indictment in Count Two, Part VI, stated about the wars "against Poland, 1 September 1939; against the United Kingdom and France, 3 September 1939; against Denmark and Norway, 9 April 1940; against Belgium, the Netherlands, and Luxembourg, 10 May 1940; against Yugoslavia and Greece, 6 April 1941; against the U.S.S.R., 22 June 1941; and

---

28. Trial of The Major War Criminals, op.cit., 1947, Vol. 1, p. 42.

29. Ibid., p. 42.

against the U.S.A., 11 December 1941".[30] Although these twelve countries named are in order of the initiation of the wars, it is noteworthy that Austria and Czechoslovakia were not included[31] in the Indictment.

Count Two referred to Count One of the Indictment for the allegations charging that those wars were wars of aggression on the part of the accused. It also referred to Appendix C annexed to the Indictment, for the particulars of the charges of violations of international treaties, agreements, and assurances caused by the accused in the course of planning, preparing, and initiating those wars. Further, reference was made to Appendix A of the Indictment for the responsibility of the individual accused for the offences set forth, and to Appendix B for the responsibility of the groups and organisations named as criminal for the offences mentioned in Count Two of the Indictment.[32]

Legal Basis of Crimes against Peace

Count One and Count Two of the Indictment were drafted in accordance with Article 6 of the Nuremberg Charter, which dealt with "Crimes against Peace". Although both these Counts were interrelated to each other, they dealt with separate crimes mentioned in Article 6 of the Charter.

---

30. Ibid.
31. Taylor, "The Nuremberg War Crimes Trials", op.cit. note 24, p. 259.
32. Trial of the Major War Criminals, Vol.1, op.cit., p.42.

The essence of the charges against the accused under Counts One and Two rest upon two fundamental premises: (1) that aggressive war has been outlawed by the community of states, and (2) that acts committed in planning or waging such a war are now international crimes for which individuals may be criminally punished.[33] Opinions of authors on the interpretation of both these premises vary greatly. Relatively few authors have completely endorsed them. Some have condemned them as "Unjustified under international law", while some others have described them as "political and in other ways non-legal charge".[34] Schick, for instance, by holding the "Crimes against Peace" to be "the heart of the case"[35] maintains: "As long as the exercise of the right to render this vital decision is reserved to the victor his verdict, pronouncing that the vanquished resorted to an illegal war, will constitute a legally problematical and politically hazardous act".[36] Further, he claims, "De lege ferenda the dictum of the International Military Tribunal according to which recourse to illegal war constitutes

---

33. Finch, George A., "The Nuremberg Trial and International Law", American Journal of International Law, Vol. 41, 1947, p. 25.

34. Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens and Sons Limited, London, 1960, pp. 167 - 168.

35. Schick, F.B., "The Nuremberg Trial and The International Law of the Future", American Journal of International Law, Vol. 41, 1947, p. 782.

36. Ibid., p. 783.

the commission of a crime for which its perpetrators are individually responsible, is of far reaching importance. De lege lata the judgment does not correspond with the rules of general international law".[37]

The International Military Tribunal at Nuremberg, of course, declared that it considered aggressive war a crime according to international law, the Supreme crime, in fact, since it affected not only the parties to a conflict, but the whole world, and combined in itself all the horrors of war.[38] Also the Court upheld that the individuals could be held liable for committing acts of planning, preparing, initiating or waging an aggressive war or participating in a common plan or conspiracy to accomplish any of these ends, because they were necessary means for conducting an aggressive war.[39]

Some writers claim natural law to be the basis for crimes against peace. They argue that the principles based on the dictates of human conscience would attain universal validity, and the provisions of agreements founded upon them would not only apply to the signatory states, but to all nations. They would represent valid international law,

---

37. Ibid., p. 785.

38. Trial of The Major War Criminals, op. cit., 1948, Vol. XXII, p. 461.

39. Ibid., p. 467; Also see, in this connexion, judgment of IMT in Chapter IV.

and the fact that they had not been codified in any treaty or confirmed through continued practice of states would not detract from their binding character.[40] But natural law can be interpreted by a nation or authority to suit its own interest, and it may endanger the legal security in the family of nations, and therefore, cannot serve as a legal basis for certain existing rule in international law.[41]

It has also been maintained that the crime against peace should be considered political rather than legal in character, and that prosecution for this charge was justified on grounds that the accused constituted a threat to the established order among States. The trial of the accused for crimes against peace would, therefore, be a kind of "security measure" to prevent the recurrence of such violations against international peace.[42] However, there is no sanction in international law for such "security measures", neither for any summary punishment.

The International Military Tribunal at Nuremberg, of course, indicated that no injustice was done in applying the concept of crime against peace by showing that a crime against peace was a violation of international law for

---

40. Wright, Lord, "War Crimes under International Law", Law Quarterly Review, 1946, p. 547.

41. Woetzel, op. cit., p. 169.

42. Ibid., pp. 169-170.

which an individual could be held responsible under international law.

As has been mentioned earlier that by agreement between the four Chief Prosecutors, America was to deal with the so-called common plan or conspiracy; Britain with the crimes against peace; the U.S.S.R., and France with War Crimes and Crimes against Humanity in East and West respectively. Any division would have been difficult to work out in practice, since everything tended to overlap with everything else.[43]

It is for this reason that Telford Taylor, then Brigadier General of U.S.A., and Chief of Counsel for War Crimes at Nuremberg wrote: "The Indictment, too, was "international" on its face. Counts One and Two, charging conspiracy and crimes against peace, were drafted in principal part by the English and Americans, following common law practice, the charges were reasonably precise, but the evidence in support thereof was not set forth in detail. Counts Three and Four, charging war crimes and crimes against humanity, were based largely on evidence

---

43. Calvocoressi, Peter, Nuremberg - The Facts, the Law and the Consequences, The Macmillan Company, New York, 1948, p. 24; Also see Maugham, U.N.O. and War Crimes, op. cit., pp. 35-36.

of particular atrocities supplied by the Russians, the French, or other German-occupied countries, and reflected the Continental practice of "pleading" the details in the Statement of Charges".[44]

It remains now to be seen what other charges against the accused were mentioned in the Indictment at Nuremberg.

Legal Basis of War Crimes

Count Three of the Indictment submitted by the Prosecution before the Nuremberg IMT dealt with "War Crimes", It was prepared in pursuance with Article 6, especially 6(b), of the Nuremberg Charter.[45]

The concept of War Crimes is not new in the international law of war. In its "narrow sense", it also existed in the past. It is beyond argument that military courts in past wars have habitually tried and punished enemy persons captured and found to have been guilty of acts in violation of the customary rules of war. It is well settled international law that the perpetrators of war crimes can be punished by the State whose nationals have been outraged. It would be the nadir or illogicality

---

44. Taylor, "The Nuremberg War Crimes Trials", op.cit., p. 259.

45. Article 6(b) of the Nuremberg IMT Charter.

that anyone should escape because he had committed war crimes against the nationals of many States.[46]

All the worst atrocities are included in the following list of the more important and recognized war crimes :- murder and massacre, systematic terrorism, putting hostages to death, torture of civilians, starvation of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, internment of civilians under inhuman conditions, compulsory enlistment of soldiers among the inhabitants of occupied territory, wanton devastation and destruction of property, destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew, destruction of fishing boats, destruction of hospitals and hospital ships, use of poison gas, and explosive bullets, and ill-treatment of wounded or of prisoners of war.[47]

Individuals committing these crimes could be caught, tried and punished. All these crimes are committed either

---

46. Kilmuir, Viscount, Right Hon., Nuremberg in Retrospect, Presidential Address delivered at the Holdsworth Club of the Faculty of Law in the University of Birmingham, 1956, p. 13.

47. Maugham, op. cit., p.44; For a detailed account of war crimes also see, Oppenheim, L., International Law, (ed. Lauterpacht), Vol. II, Seventh Edition, 1952, note 2, pp. 567-568.

personally or under the direction of the men whom it is desired to punish. These men must be responsible for the crime charged against them. Thus, direct responsibility of the individuals for committing war crimes has long since been recognized by international law.

But War Crimes defined in the Nuremberg Charter were mainly based on the Hague Convention of 1907, and the Geneva Convention of 1929. War Crimes had also been defined in a report presented to the Allies in March 1919 by the Commission of Fifteen[48] appointed to enquire into certain questions of International Law for the guidance of the Peace Conference. This report specified thirty different varieties of War Crimes.[49]

The inflicting of damage and hurt not justified by military necessity had been frequently denounced and accepted as punishable since the sixteenth century at the latest. Military tribunals have, in fact, tried and punished those who have offended against this principle; the basis of such a trial being that a state of war justifies killing and other normally criminal acts, but that even in time of war each such act must be shown to have been necessitated by

---

48. For a reference of the Preliminary Commission of Fifteen see Chapter I.

49. Salvocoressi, op. cit., p. 45.

the war. War, it is said, gives no umbrella justification.[50]

War Crimes committed by Germans during the second World War was "overwhelming in its volume and its details". Those crimes were planned at the highest level and carefully thought out in advance. They were part of high policy, and in the German armoury crime had been added to war as an instrument of policy. In previous wars crimes had been committed in the field, as they always will be in the heat of the moment, but in this last war they had been cooly calculated and premeditated and were generally and systematically ordered and committed.[51] The responsibility, therefore, rested even more heavily on those who devised and instigated than on the common soldier in the field who actually pulled the trigger or pocketed the loot.[52]

In fact, as reported by the 1919 Commission of Fifteen that all persons, including Chiefs of State, could be prosecuted for War Crimes, after the second World War Chiefs of State were prosecuted for War Crimes. This shows how the law marches on.

However, during the second World War, "War Crimes were committed on a vast scale, never before seen in the

---

50. Ibid.

51. Ibid., p. 47.

52. Ibid.

history of war". It is convenient to divide the crimes into two categories: (1) crimes against fighting men, and (2) crimes against civilians. In the first category there were included : the order to slaughter commandos to the last man even if they surrendered; the order to separate political commissars from other Russian prisoners and shoot them; ill-treatment and murder of Russian prisoners; the use of prisoners for medical experiments; the use of prisoners for labour contrary to international conventions. Against the civilian population the following crimes were charged: extermination of certain sections by organised mass murder; large-scale deportation for labour in Germany in the most shocking conditions; the taking and shooting of hostages; the economic exploitation of occupied territories over and above the needs of the occupying troops; wanton devastation of towns and villages; the plunder of works of art, and the like.

War Crimes Charges at Nuremberg

While giving the "Statement of the Offence", Count Three of the Indictment stated: "All the defendants committed War Crimes between 1 September 1939 and 8 May 1945, in Germany and in all those countries and territories occupied by the German Armed Forces since 1 September 1939, and in Austria, Czechoslovakia, and Italy and on the High Seas.

"All the defendants, acting in concert with others, formulated and executed a Common Plan or Conspiracy to commit War Crimes as defined in Article 6(b) of the Charter. This plan involved, among other things, the practice of "total war" including methods of combat and of military occupation in direct conflict with the laws and customs of war, and the Commission of crimes perpetrated on the field of battle during encounters with enemy armies, and against prisoners of war, and in occupied territories against the civilian population of such territories.

"The said War Crimes were committed by the defendants and by other persons for whose acts the defendants are responsible (under Article 6 of the Charter) as such other persons when committing the said War Crimes performed their acts in execution of a common plan and conspiracy to commit the said War Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organisers, instigators, and accomplices.

"These methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilised nations, and were involved in and part of a systematic course of conduct".[53]

---

53. Trial of the Major War Criminals, 1947, Vol. 1, op.cit., pp. 42-43.

It was charged that throughout the period of their occupation of territories overrun by their armed forces the accused for the purpose of systematically terrorizing the inhabitants, murdered and tortured civilians, ill-treated and imprisoned them without legal process. The murders and ill-treatment were carried out by divers means, including shooting, hanging, gassing, starvation, gross over crowding, systematic under-nutrition, systematic imposition of labour tasks beyond the strength of those ordered to carry them out; inadequate provision of surgical and medical services; kickings, beatings, brutality and torture of all kinds, including the use of hot irons and pulling out of finger-nails and performance of experiments by means of operations and otherwise on living human subjects. In some occupied territories the accused interfered in religious matters, persecuted members of the clergy and monastic orders, and expropriated church property. They conducted deliberate and systematic "genocide", viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, Gypsies and others.[54]

---

54. Ibid., pp. 43-44.

Furthermore, it was alleged that the civilians were systematically subjected to tortures of all kinds, with the object of obtaining information. They were subjected systematically to "protective arrests" whereby they were arrested and imprisoned without any trial and any of the ordinary protections of the law; and they were imprisoned under the most unhealthy and inhumane conditions.

In the Concentration Camps were many prisoners who were classified "Nacht und Nebel" (Night and Fog). These were entirely cut off from the world and were allowed neither to receive nor to send letters. They disappeared without trace and no announcement of their fate was ever made by the German authorities.[55] It was said to be the most inhumane device of secret spiriting away of the offenders without trial.[56]

Such murders and ill-treatment, the Indictment said, were contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907, the Laws and Customs of War, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter.[57]

---

55. Ibid., p. 44.

56. See Calvocoressi, op. cit., p. 49.

57. Trial of the Major War Criminals, op.cit., Vol.1,p.44.

Such crimes were committed mainly in France, Belgium, Denmark, Holland, Norway, Luxembourg, Italy, and the Channel Islands (Western Countries) and in that part of Germany which lies west of a line drawn due north and south through the center of Berlin (Western Germany). Such murder and ill-treatment took place in concentration camps and similar establishments set up by the accused, and particularly those set up at Belsen, Buchenwald, Dachau, Breendonck, Grini, Natzweiler, Ravensbruck, Vught, Amersfoort, and in numerous cities, towns, and villages, including Oradour-sur-Glane, Trondheim, and Oslo.[58]

The Indictment charged that arbitrary arrests were carried out under political or racial pretexts; they were both individual and collective. In France, notably such arrests were carried out in Paris (round-up of the Jewish population); at Clermont-Ferrand (round-up of Professors and students of the University of Strasbourg, who were taken to Clermont-Ferrand on 25 November 1943); at Lyons: at Marseilles (round-up of 40,000 persons in January 1943); at Grenoble (round-up of 24 December 1943); at Cluny, Figeac, Saint Pol de Leon, Locmine, Bysieux, and at Moussey.[59] These arrests, as charged, were followed by brutal treatment

---

58. Ibid.

59. Ibid., p. 45.

and tortures carried out by the most diverse methods, such as immersion in icy water, asphyxiation, torture of the limbs, and the use of instruments of torture, such as the iron helmet and electric current. Moreover, it was alleged that in the Concentration Camps the rate of mortality attained enormous propertions. For instance: out of a convoy of 230 French women deported from Compiegne of Auschwitz in January 1943, 180 died of exhaustion by the end of four months; similarly, 143 Frenchmen died between 23 March and 6 May 1943, in Block 8 at Dachau; 1,797 between 21 November 1943 and 15 March 1945, in the Block at Dora; 22,761 at Buchenwald between 1 January 1943, and 15 April 1945; 11,560 at Dachau Camp (most of them in Block 30 reserved for the sick and the infirm) between 1 January and 15 April 1945; and 780 priests at Mauthausen, - all died of exhaustion.[60]

The Indictment revealed interesting methods used for the work of extermination in Concentration Camps, those were: Bad treatment, pseudo-scientific experiments (sterilisation of women at Auschwitz and at Ravensbruck, study of the evolution of cancer of the womb at Auschwitz, of typhus at Buchenwald, bone grafting and mascular excisions at Ravensbruck, etc.), gas chambers, gas wagons

---

60. Ibid.

and crematory ovens.[61] Out of a total of 228,000 French political and racial deportees in Concentration Camps, only 28,000 survived. At Oradoursur Glane, the entire village population was shot or burned alive in the church.[62]

It was also charged that in Denmark, about 1,100 persons were murdered and many more were ill-treated or tortured. Such murders and ill-treatments also continued in Belgium, in Holland, in Luxembourg, and in Italy where, between March 1944 and April 1945, about 7,500 men, women and children ranging from infancy to old age, were murdered at Civitella, in the Ardeatine caves in Rome by the Germans.

The murders and ill-treatment were also carried out in the "Eastern Countries" which included the U.S.S.R., i.e., in the Bielorussian, Ukrainian, Estonian, Latvian, Lithuanian, Karelo-Finnish, Moldavian Soviet Socialist Republics, in 19 regions of the Russian Soviet Federated Socialist Republic, and in Poland, Czechoslovakia, Yugoslavia, Greece, and the Balkans. In the "Eastern Germany" too, (i.e. in that part of Germany which lies east of aline drawn north and south through the center of Berlin), such crimes were committed.

---

61. Ibid., pp. 45-46.

62. Ibid., p. 46.

About 1,500,000 persons were exterminated at Maidanek and about 400,000 in Auschwitz concentration camps, among whom were citizens of Poland, the U.S.S.R., the United States of America, Great Britain, Czechoslovakia, France, and other countries.[63]

In the Lwow region about 700,000 people, in the Ganov Camp 200,000 persons, in the Ozarichi region of the Bielorussian S.S.R. about tens of thousands of persons were exterminated or tortured by various methods. The Germans brought many people to those camps from typhus hospitals intentionally, for the purpose of infecting the other persons interned and for spreading the disease in territories from which the Germans were being driven by the Red Army.[64]

In the Estonian S.S.R., the Germans shot tens of thousands of persons and in one day alone, 19 September 1944. Similar tortures and murders continued also in the Lithuanian S.S.R., Latvian S.S.R., in the Smolensk region, in the Leningrad region, in Stavropol region, in Pyatigorsk, in Orel, in Minsk, in Rovno region, in Podolsk region, in Odessa region and various other places.

---

63. Ibid., p. 47.

64. Ibid., pp. 47-48.

In the Stalingrad region more than 40,000 persons were tortured and killed. After the Germans were expelled from Stalingrad, more than a thousand mutilated bodies of local inhabitants were found with marks of torture. One hundred and thirty-nine women had their arms painfully bent backward and held by wires. From some, their breasts had been cut off and their ears, fingers, and toes had been amputated. The bodies bore the marks of burns. On the bodies of the men the five pointed star was burned with an iron or cut with a knife. Some were disembowelled.[65] In Crimea peaceful citizens were gathered on barges, taken out to sea and drowned, over 144,000 being exterminated in this manner. In Dnepropetrovsk, near the Transport Institute, they shot or threw alive into a great ravine 11,000 women, old men and children.

Allegation was also made that along with adults the Nazi Leaders mercilessly destroyed even children. They killed them with their parents, in groups, and alone. They killed them in children's homes and hospitals, burying the living in the graves, throwing them into flames, stabbing them with bayonets, poisoning them, conducting experiments upon them, extracting their blood for the use of the German Army, throwing them into prison and Gestapo torture chambers and concentration camps, where the children died from hunger, torture, and epidemic diseases.[66]

---

65. Ibid., p. 49.

66. Ibid., p. 50.

From 6 September to 24 November 1942, in the region of Brest, Pinsk, Kobren, Dyvina, Malority, and Berezykartuzsky about 400 children were shot by the German punitive units. In the Yanov camp in the city of Lwow 8,000 children were killed within two months. In the resort of Tiberda 500 children, suffering from tuberculosis of the bone, who were in the sanatorium for the cure, were annihilated. On the territory of Latvian S.S.R., they killed thousands of children.

In Czechoslovakia, in Greece, and in Yugoslavia many thousands of civilians were said to have been murdered. The charge was that it was a policy of the Germans to deport able-bodied civilians of the occupied countries to Germany and to other occupied countries for slave-labour upon defence works, in factories and in other tasks connected with war efforts. Such deportees were subjected to the most barbarous conditions of overcrowding; they were provided with wholly insufficient clothing and were given little or no food for several days. The conditions of transport were such that many deportees died in the course of the journey, for example: in one of the wagons of the train which left Compiegne for Buchenwald, on 17 September 1943, 80 men died out of 130; on 4 June 1944, 484 bodies were taken out of the train at Sarrebourg; in a train which left Compiegne on 2 July 1944 for Dachau, more than

600 (i.e. one-third of the total number) dead were found on arrival. Millions of persons were deported, under most inhuman conditions, for slave-labour purposes from the Western and Eastern Countries. Those were said to be contrary to international conventions.[67]

The accused murdered and ill-treated prisoners of war by denying them adequate food, shelter, clothing, medical care and attention; by forcing them to labour in inhumane conditions; by torturing them and subjecting them to inhuman indignities and by killing them. Members of the armed forces of the countries with whom Germany was at war were frequently murdered, while in the act of surrendering. It was argued, however, that those murders and ill-treatment were contrary to international conventions, particularly Articles 4,5,6 and 7 of the Hague Regulations, 1907, and to Articles 2,3,4, and 6 of the Prisoners of War Convention (Geneva, 1929), the Laws and Customs of War, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter.

Furthermore, the Indictment said that frequently the prisoners captured were obliged to march to the camps until they completely collapsed. Some of them walked more

---

67. Ibid., pp.51 - 52.

than 600 kilometers with hardly any food; they marched on for 48 hours running, without being fed; among them a certain number died of exhaustion or of hunger; stragglers were systematically murdered. Bodily punishments were inflicted upon non-commissioned officers and cadets who refused to work. In reprisal camps as in Rava-Ruska, the food was so insufficient that the men lost more than 15 Kilograms in a few weeks. For instance, in May 1942, one loaf of bread only was distributed in Rava-Ruska to each group of 35 men.[68] Soviet prisoners were murdered en masse on orders from the High Command and the Headquarters of the SIPO and SD. Similarly other prisoners were exterminated by starvation, shooting, exposure, and poisoning.

In their course of aggressive war, the Nazi Leaders adopted wide scale practice of taking, and of killing hostages from the civilian population, contrary to International Conventions.

The Germans ruthlessly exploited the people and the material resources of the countries occupied, with the intention of strengthening Nazi war machine and to depopulate and improvish the rest of Europe, and also to enrich themselves, their adherents and to promote German economic supremacy over Europe. They removed food stuffs, raw

---

68. Ibid., p. 58.

materials, confiscated business, plants and other property, controlled the economy of the occupied countries, directed their resources, their production and their labour in the interest of German war economy. They also destroyed industrial cities, cultural monuments, scientific institutions and property of all types of the occupied countries, to further the plan of criminal exploitation, and to eliminate the possibility of competition with Germany.[69] For example, the overall value of the material loss of the U.S.S.R. was computed to be 679,000,000,000 rubles in state prices of 1941; total loss of Czechoslovakia from 1938 to 1945 was 200,000,000,000 Czech crowns; in Belgium between 1940 and 1944 the damage amounted to 175 billions of Belgium francs; in France there was plundered articles of enormous value and in addition, from June 1940 to September 1944, the French Treasury was compelled to pay to Germany 631,866,000,000 francs.

In the occupied countries, it was charged that the Germans imposed collective penalties, pecuniary or otherwise, for the acts of individuals. For instance, the total amount of fines imposed on French communities add up to 1,157,179,484 francs included, (1) A fine on the Jewish population - 1,000,000,000, and (2) Various fines - 157,179,484 francs.[70]

---

69. Ibid., pp. 55-56.

70. Ibid., pp. 60-61.

There was also wanton destruction of cities, towns, and villages and devastation not justified by military necessity which were charged in the Indictment. For example, in April 1942, the town of Telerag in Norway was destroyed; the towns of Lezaky and Lidice in Czechoslovakia were burned to the ground; several villages in France were destroyed, and among others were Oradoursur-Glane, Saint Nizier, and in the Vercors, La Mure, Vassieux, La Chapelle en Vencors.

There was, moreover, conscription of civilian labour utilised for other needs than that of the armies, and to an extent, far out of proportion to the resources of the countries involved. Civilians were forced to join semi-military organisations and had to work for German war effort. In France, for instance, from 1942 to 1944, 963,813 persons were compelled to work in Germany and another 737,000 had to work in France for German Army. In Luxembourg in 1944 alone, 2,600 men and 500 girls were conscripted for forced labour.[71]

Civilians of occupied territories, it was charged, were forced to swear allegiance, a solemn oath acknowledging unconditional obedience to Adolf Hitler, the Fuhrer of Germany,under the threat of food, money, identity papers etc.

---

71. Ibid., p. 62.

The last but not the least of the crimes committed by the Germans and included in the Indictment under "War Crimes", were "Germanization of occupied countries". The Nazi leaders methodically and pursuant to their plan endeavored to assimilate the territories of the occupied countries politically, culturally, socially and economically into the German Reich. This plan, as alleged, included economic domination, physical conquest, installation of puppet governments, purported dejure annexation and enforced conscription into the German Armed Forces. And this plan was mostly implemented in Norway, France, Luxembourg, Soviet Union, Denmark, Belgium and Holland. Inhabitants of those countries, who were predominantly "non-German", were forcibly deported and in their place thousands of German colonists were installed. From 1940 all the French schools were closed and their staff were expelled. German school system was introduced in three French Departments. On 28 September 1940, an order applicable to the Department of Moselle ordained the Germanization of all surnames and Christian names, which were French in form. The same order was too applicable from 15 January 1943 in the Departments of Upper Rhine and Lower Rhine.[72]

---

72. Ibid., pp. 63-64.

Leaving aside all these examples, vast mass of evidence was presented to the Tribunal on the charges of War Crimes, and for the commitment of those offences, the Prosecution held the individuals committing them to be directly responsible.

Crimes Against Humanity in the Nuremberg Indictment.

Article 6(c) of the Charter of the Nuremberg IMT defined "Crimes against Humanity".[73]

Apparently Crimes against Humanity overlap War Crimes. More often than not a crime which is a Crime against Humanity is also a War Crime and vice versa. However, it was said that the expression "Crimes against Humanity" was not a new one, invented by the Nuremberg prosecution in order to extend the scope of their indictment. The Crimes against Humanity of which the Tribunal was asked to take cognizance were, in fact, strictly delimited.[74] The Charter, of course, limited crimes against humanity to those connected with other offences within the jurisdiction of the Tribunal. The Tribunal consequently declined to declare that acts of the character described in the definition which had been committed before 1 September 1939, when the

---

73. Article 6(c) of the Nuremberg IMT Charter.

74. Calvocoressi, op. cit., p. 57.

first war of aggression began, were crimes against humanity within the meaning of the Charter. They had, therefore, no difficulty in finding that crimes against humanity in this narrow sense were crimes under customary international law at the time they were committed.[75] The Tribunal said shortly: "In so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity."[76]

Such acts, as defined under "Crimes against Humanity" in the Charter, when perpetrated within a State's own boundaries against its own citizens, have in the past often occasioned "humanitarian intervention by other States".[77] The preamble to the Hague Convention on laws and customs of war on land refers to the "laws of humanity" and the "requirements of the public conscience", which would apply to atrocities against such citizens as well as against aliens.[78]

---

75. Kilmuir, op. cit., p. 13.

76. Trial of The Major War Criminals, Vol.XXII, op. cit., p. 498.

77. See Kilmuir, op. cit., p. 14.

78. Preambles of the Hague Conventions of 1899(II) and 1907 (IV) regarding the Laws and Customs of War on land; Also see Kilmuir, op. cit., p. 14; Woetzel, op. cit., note 14, pp. 181-182.

Count Four of the Indictment at Nuremberg dealt with the "Crimes against Humanity". This was prepared by the Prosecution in pursuance with Article 6, especially 6(c) of the Nuremberg Charter.[79] This Count of the Indictment mostly referred to the offences described in the previous Count i.e. Count Three of the Indictment. The Indictment said: "All the defendants committed Crimes against Humanity during a period of years preceding 8 May 1945 in Germany and in all those countries and territories occupied by the German armed forces since 1 September 1939 and in Austria and Czechoslovakia and in Italy and on the High Seas.

"All the defendants, acting in concert with others, formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined in Article 6(c) of the Charter. This plan involved, among other things, the murder and persecution of all who were or who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan alleged in Count One".[80]

The accused, it was charged, participated as leaders, organisers, instigators and accomplices, while committing

---

79. Trial of The Major War Criminals, Vol. I, 1947, op. cit., p. 65.

80. Trial of The Major War Criminals, Vol. I, 1947, op. cit., p. 65.

those crimes. These were all said to have been committed in violation of the international conventions, internal penal laws, general principles of criminal law as derived from the criminal law of all civilized nations, and were involved in and part of a systematic course of conduct. Moreover, the said acts were contrary to Article 6 of the IMT Charter.

The charges in Count Four of the Indictment included, "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war".[81] The Nazi Leaders adopted a policy of persecution, repression, and extermination of all civilians in Germany hostile to the Nazi Government, and the Common Plan or Conspiracy. They were imprisoned without trial, put in "Protective Custody", in concentration camps, and were subjected to persecutions, degradation, despoilment, enslavement, torture and murder.[82] Special courts were established to carry out the will of the accused. "Undesirable" elements were crushed. Slave labour was practised in the concentration camps; murder and ill-treatment by divers means were followed. All those offences were narrated in Count Three of the Indictment and were committed after 1 September 1939 until 8 May 1945.

---

81. Ibid., p. 66.

82. Ibid.

The "persecution on political, racial, and religious grounds in execution of and in connexion with the Common Plan (mentioned in Count One)" was another charge included in Count Four of the Indictment. All opponents of the German Government were systematically exterminated and persecuted. Those, whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis, were persecuted.

Furthermore, the Indictment said that the Jews were systematically persecuted since 1933. They were deprived of their liberty and were thrown into the concentration camps where they were murdered and ill-treated. Their property was confiscated. Hundreds of thousands of Jews were so treated before 1 September 1939.

But since 1 September 1939, the persecution of the Jews was redoubled. Millions of Jews from Germany and from the occupied Western countries were sent to the Eastern countries for extermination.

The Nazis murdered amongst others Chancellor Dollfuss, the Social Democrat Breitscheid, and the Communist Thalmann. They imprisoned in concentration camps numerous political and religious personages, for example, Chancellor Schuschnigg and Pastor Niemoler. In November 1938, by

orders of the Chief of the Gestapo, anti-Jewish demonstrations all over Germany took place. 30,000 Jews were arrested and sent to concentration camps; their property being confiscated and destroyed. At Kislovdosk all Jews were made to give up their property. 6,300 Jews were shot in an anti-tank ditch at Mineraliye Vodi.[83]

Jews shot at various other places by the Nazis included: 60,000 on an island on the Dvira near Riga; 20,000 at Lutsk; 32,000 at Sarny; 60,000 at Kiev and Dniepropetrovsk. Thousands of Jews were gassed weekly by means of gas wagons which broke down from overwork.[84]

When the Germans retreated before the Soviet Army, they exterminated the Jews rather than allow them to be liberated. Many concentration camps and ghettos were set up in which Jews were incarcerated and tortured, starved, subjected to merciless atrocities and were finally exterminated. In Yugoslavia about 70,000 Jews were exterminated. Evidence was also given of the evacution of 110,000 Jews from part of Romania for "Liquidation". Adolf Eichmann, who had been put in charge of this programmby Hitler, has estimated that the policy pursued resulted in the killing of 6,000,000 Jews, of which 4,000,000 were killed in the

---

83. Ibid., p. 67.

84. Ibid.

extermination institutions.[85] Other population groups that suffered the same fate were gypsies, Jehovah's Witnesses, and large segments of the intelligentsia of occupied territories, especially Poland.

Statements and Witnesses Concerning the Crimes

The record of Nazi atrocities reads like a fantastic fairy-tale unparalleled in its heinous proportions by even the wildest outrages of conquerors of the past. The severity and magnitude of all those crimes committed by the Nazi Leaders, which followed as a matter of course, could be realised, as it was suggested by the Prosecution, from an examination of the words of prominent German personalities and the evidences given by some witnesses before the Tribunal mentioned below:

Himmler, October 1943:[86]

"What happens to a Russian, a Czeck, does not interest me in the slightest.[87] What the nations can offer in the way of good blood of our type, we will take. If

---

85. Trial of The Major War Criminals, Vol.XXII, op. cit., p. 495; Also see Woetzel, op. cit., note 6, pp.174-175.

86. Heinrich Himmler was a minister of the Third Reich (Germany) from 25-8-1943 upto the capitulation of 1945, and was in charge of the Interior, Justice, Education, Churches and Space Allocation ministries.

87. "How the Russians or Czechs fare is absolutely immaterial to me" - corrected translation in the Appendix, Trial of The Major War Criminals, Vol.XXII, op. cit., p. 590.

necessary, by kidnapping their children and raising them here with us. Whether nations live in prosperity or starve to death interests me only insofar as we need them as slaves for our culture, otherwise it is of no interest to me".[88]

Himmler, 1943 (Speeches to officers of his S.S.Units):

"Whether ten thousand Russian females fall down from exhaustion while digging an anti-tank ditch interests me only insofar as the anti-tank ditch for Germany is finished".[89]

Himmler, 1943 (to all the commanding officers of one of his divisions);

"Anti-Semitism is exactly the same as delousing. Getting rid of lice is not a question of ideology, it is a matter of cleanliness. In just the same way anti-Semitism for us has not been a question of ideology but a matter of cleanliness".[90]

Sauckel, 1 March 1944 (in a meeting of the Central Planning Board):

"Out of the five million workers who arrived in Germany, not even 200,000 came voluntarily".[91]

---

88. Trial of The Major War Criminals,1948,Vol.XXII,<u>op.cit.</u>, p. 480.
89. <u>Ibid.</u>, p. 231; Also see Calvocoressi, <u>op.cit.</u>,p.51.
90. Trial of The Major War Criminals,Vol.XXII,<u>op.cit.</u>,p.232.
91. <u>Ibid.</u>,p.487;Fritz Sauckel,one of the accused at Nuremberg.

Sauckel, 1942:

"All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure".[92]

Field-Marshal Milch, 16 February 1943 (in a meeting of the Central Planning Board in which the accused, Sauckel and Speer, were present):

"We have made a request for an order that a certain percentage of men in the Ack-Ack artillery must be Russians; 50,000 will be taken altogether. 30,000 are already employed as gunners. This is an amusing thing, that Russians must work the guns".[93]

Goering, 1942:

"This everlasting concern about foreign people must cease now, once and for all ... It makes no difference to me in this connection if you say that your people will starve".[94]

Field-Marshal von Reichenau, 1941:

"The soldier must have full understanding for the necessity for a severe but just revenge on subhuman Jewry".[95]

---

92. Calvocoressi, op. cit., p. 52.
93. Trial of The Major War Criminals, Vol.XXII, op.cit., p. 490; Also see Calvocoressi, op.cit., p. 52.
94. Calvocoressi, op.cit., p.51; Hermann Wilhelm Goering, Successor designate to Hitler, and the accused before the IMT Nuremberg.
95. Quoted in Calvocoressi, op. cit., p. 52.

Field-Marshal Keitel, 1943:

"Human life is worthless than nothing in the occupied territories".[96]

Rosenberg, 1942:

"If we are to subjugate all these peoples, then arbitrary rule and tyranny will be an extremely suitable form of government".[97]

Koch, the Governor of the Ukraine:

"We are the master race ... I will squeeze the last drop out of this country... The people must work, work and work. We are a master race".[98]

General Reinecke, a Departmental Chief in the OKW (also in charge of prisoners of war):

"The Bolshevist soldier has lost all claim to treatment as an honourable opponent in accordance with the Geneva Convention... The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevist fantatics. Insubordination, active or passive resistance, must be broken immediately by force of arms (bayonets,

---

96. Ibid.

97. Ibid.

98. Ibid., p. 51.

butts and firearms)... Anyone carrying out the order who does not use his weapons, or does so without sufficient energy, is punishable... Prisoners of war attempting escape are to be fired on without previous challange. No warning shot must ever be fired... The use of arms against prisoners of war is as a rule legal".[99]

A captured German report, dated 7 August 1942 (with regard to Alsace):

"The problem of race will be given first consideration, and this in such a manner that persons of racial value will be deported to Germany proper, and racially inferior persons to France".[100]

The Prosecution further argued that it would not be difficult to multiply such quotations. But what was the effect of all these? A few examples of the evidences given by the witnesses, it was said, would establish the facts.

Hoess, the Commandant of the Auschwitz concentration camp from 1 May 1940 to 1 December 1943, described: "We had two SS doctors on duty at Auschwitz to examine the incoming transports of prisoners. The prisoners would be marched past one of the doctors, who would make spot decisions as they walked by. Those who were fit for work were sent into

---

99. Ibid., p. 49.

100. Trial of The Major War Criminals, Vol. XXII, op.cit., p. 481.

the camp. Others were sent immediately to the extermination plant. Children of tender years were invariably exterminated since, by reason of their youth, they were unable to work ... Very frequently the women would hide their children under their clothes, but of course when we found them we would send the children to be exterminated... We were required to carry out these exterminations in great secrecy, but of course the foul and nauseating stench from the continuous burning of bodies permeated the entire area and all the people living in the surrounding communities knew that exterminations were going on at Auschwitz ... It took from three to fifteen minutes to kill the people in the death chamber, depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about half an hour before we opened the doors and removed the bodies. After the bodies were removed our special detachments took off the rings and extracted the gold from the teeth of the corpses".[101]

A Norwegian, one of 2,500 'Nacht and Nebel' prisoners who were moved from one camp to another in 1945 said:

"Feeble as we were, we could not walk fast enough and when they took their guns, the line of five, the line

---

101. Ibid., p. 495; Also see Calvocoressi, op.cit.,p.54; Woetzel, op. cit., p. 175.

just before us - they took their guns and smashed in the heads of all five of them, and they said: 'If you don't walk in an intelligent way see what will happen to you'... But at last after six to eight hours we came to a railway station. It was very cold, and we had only striped prison clothes on and bad boots naturally, but we said, 'Oh, we are glad that we have come to a railway station. It is better to stand in a cow truck than to walk in the middle of winter'. It was very cold, ten to twelve degrees I suppose, very cold. There was a long train with open trucks. In Norway we call them sand trucks and we were kicked on to those trucks about 80 on each truck... In this truck we sat for about five days without food - cold - without water. When it was snowing we made like this just to get some water in the mouth and naturally after a long long time, it seemed to me like years, we came to a place which I afterwards learnt was D, which is in the neighbourhood of Buchenwald. We came there. They kicked us down from the trucks, but many were dead. The man who sat by me, he was dead, but I had no right to get away. I had to sit with a dead man for the last day, and I didn't see the figures myself, naturally, but about half of us were dead, getting stiff, and they told that-I heard the number afterward in D. - that the number of dead on our train was 1,347".[102]

---

102. Quoted from Calvocoressi, op. cit., p. 50.

At Essen, the evidence of a German railway official:

" They came in goods wagons in which potatoes, building materials and also cattle had been transported. The trucks were jammed full with people. My personal view was that it was inhuman to transport people in such a manner. The people were squashed closely together and they had no room for free movement. It was enraging to every decent German to see how the people were beaten and kicked and generally maltreated in a brutal manner. In the very beginning, as the first transports arrived, we could see how inhumanely these people were treated. Every wagon was so overful that it was incredible that such a number could be jammed into one wagon ... The clothing of the prisoners of war and civilian workers was catastrophic. It was ragged and ripped and the footwear was the same. In some cases they had to go to work with rags round their feet. Even in the worst weather and bitterest cold I have never seen that any of the wagons were heated ".[103]

Again at Essen, the evidence of a Polish doctor (about Russian prisoners):

" The men were thrown together in such a catastrophic manner that no medical treatment was possible... It seemed to me unworthy of human beings that people should find

---

103. Ibid., p. 53.

themselves in such a position ... Every day at least ten men were brought to me whose bodies were covered with bruises on account of the continual beatings with rubber tubes, steel switches or sticks. The people were often writhing with agony and it was impossible for me to give them even a little medical aid ... It was difficult for me to watch how such suffering people could be directed to do heavy work ... Dead people often lay for two or three days on the palliasses until their bodies stank so badly that fellow prisoners took them outside and burried them somewhere ... I was a witness during a conversation with some Russian women, who told me personally that they were employed in Krupps factory and that they were beaten daily in a most bestial manner ... Beating was the order of the day".[104]

The IMT at Nuremberg had before it an affidavit of one Hermann Graebe, dated 10 November 1945, describing the immense mass murders which he witnessed. He was the manager and engineer in charge of the branch of the Solingen firm of Joseph Jung in Sdolbunov, Ukraine, from September 1941 to January 1944. Graebe described how a mass execution at Dubno, which he witnessed on 5 October 1942, was carried out like this:

---

104. Ibid., pp. 53-54.

"On 5th October 1942, when I visited the building office at Dubno my foreman told me that in the vicinity of the site Jews from Dubno had been shot in three large pits, each about thirty metres long and three metres deep. About 1,500 persons had been killed daily. All of the 5,000 Jews who had still been living in Dubno before the pogrom were to be liquidated. As the shooting had taken place in his presence he was still much upset.

"Thereupon I drove to the site accompanied by my foreman and saw near it great mounds of earth about thirty metres long and two metres high. Several trucks stood in front of the mounds. Armed Ukrainian militia drove the people off the trucks under the supervision of an S.S. man. The militia men acted as guards on the trucks and drove them to and from the pit. All these people had the regulation yellow patches on the front and back of their clothes and thus could be recognised as Jews.

"My foreman and I went directly to the pits. Nobody bothered us. Now I heard rifle shots in quick succession from behind one of the earth mounds. The people who had got off the trucks - men, women and children of all ages - had to undress upon the orders of an S.S. man, who carried a riding or dog whip. They had to put down their clothes

in fixed places, sorted according to shoes, top clothing and underclothing. I saw a heap of shoes of about 800 to 1,000 pairs, great piles of under linen and clothing. Without screaming or weeping these people undressed, stood around in family groups, kissed each other, said farewells and waited for a sign from another SS man, who stood near the pit, also with a whip in his hand. During the fifteen minutes that I stood near I heard no complaint, or plea for mercy. I watched a family of about eight persons, a man and a woman both about fifty with their children of about one, eight and ten, and two grown-up daughters of about twenty to twenty-four. An old woman with snow-white hair was holding the one-year-old child in her arms and singing to it and tickling it. The child was cooing with delight. The couple were looking on with tears in their eyes. The father was holding the hand of a boy about ten years old and speaking to him softly; the boy was fighting his tears. The father pointed to the sky, stroked his head, and seemed to explain something to him. At that moment the SS man at the pit shouted something to his comrade. The latter counted off about twenty persons and instructed them to go behind the earth mound. Among them was the family which I have mentioned. I well remember a girl,

slim and with black hair, who, as she passed close to me, pointed to herself and said, 'Twenty-three'. I walked around the mound and found myself confronted by a tremendous grave. People were closely wedged together and lying on top of each other so that only their heads were visible. Nearly all had blood running over their shoulders from their heads. Some of the people shot were still moving. Some were lifting their arms and turning their heads to show that they were still alive. The pit was already two-thirds full. I estimated that it already contained about 1,000 people. I looked for the man who did the shooting. He was an SS man, who sat at the edge of the narrow end of the pit, his feet dangling into the pit. He had a tommy gun on his knee and was smoking a cigarette. The people, completely naked, went down some steps which were cut in the clay wall of the pit and clambered over the heads of the people lying there, to the place to which the SS man directed them. They laid down in front of the dead or injured people; some caressed those who were still alive and spoke to them in a low voice. Then I heard a series of shots. I looked into the pit and saw that the bodies were twitching or the heads lying motionless on top of the bodies which lay before them. Blood was running away from their necks. I was surprised that I was not ordered

away but I saw that there were two or three postmen in uniform nearby. The next batch was approaching already. They went down into the pit, lined themselves up against the previous victims and were shot. When I walked back round the mound I noticed another truck load of people which had just arrived. This time it included sick and infirm persons. An old, very thin woman with terribly thin legs was undressed by others who were already naked, while two people held her up. The woman appeared to be paralysed. The naked people carried the woman around the mound. I left with my foreman and drove in my car back to Dubno.

"On the morning of the next day, when I again visited the site, I saw about thirty naked people lying near the pit - about thirty to fifty metres away from it. Some of them were still alive; they looked straight in front of them with a fixed stare and seemed to notice neither the chilliness of the morning nor the workers of my firm who stood around. A girl of about twenty spoke to me and asked me to give her clothes and help her escape. At that moment we heard a fast car approach and I noticed that it was an SS detail. I moved away to my site. Ten minutes later we heard shots from the vicinity of the pit. The Jews still alive had been ordered to throw the

corpses into the pit; then they had themselves to lie down in this to be shot in the neck".[105]

Legal Basis of the Crimes Against Humanity

Question arises whether a State or group of States can intervene in another country to enforce what they believe to be international law? Can the German nationals committing 'crimes against humanity' against their fellow-citizens be tried by other States?

Several examples in history has often been cited, where a group of nations has taken action to prevent or stop the abuse of rights of minorities in another state. For example, Britain, France, and Russia intervened against Turkey in 1827. There were interventions in Armenia and Crete in 1891 and 1896, because of the atrocities committed there.[106] These historic interventions, however, constituted collective actions directed against States as subjects of international law, and not against individuals. Furthermore, it has been said that if such intervention occurs in execution of an international mandate and thus had the

---

105. Trial of The Major War Criminals, Vol. XXII, op.cit., pp. 479-480; Also see Calvocoressi, op.cit., pp. 85-87.

106. For reference of such interventions see Wright, Quincy, "The Law of the Nuremberg Trial", American Journal of International Law, Vol. 41, 1947, p. 60; Woetzel, The Nuremberg Trials in International Law, op. cit., p. 178.

approval of the international community, only then it would be sanctioned under international law.[107]

The Allies, of course, did not claim the right for an international court to interfere in the domestic affairs of a sovereign State merely on the grounds that that State was offending against humanitarian principles.[108] Leaving aside the question whether such intervention is good or not, it is probably clear that international law does not extend so far.[109]

The prosecution at Nuremberg, however, contended that crimes against humanity fell within the province of international law if they were committed in preparation for or in connexion with international crimes such as aggressive war and War Crimes. This position was stated more clearly in the words of the Attorney-General:[110] "The Crimes against Humanity with which this Tribunal has jurisdiction to deal are limited to this extent - they

---

107. Woetzel, op. cit., pp. 178-179.

108. Calvocoressi, op. cit., p. 57.

109. Ibid., p. 57.

110. The closing speeches of Sir Hartley Shawcross, the English Attorney-General before the IMT at Nuremberg. Sir David Maxwell Fyfe, K.C., M.P., was the English Attorney-General until the change of Government on the 27th July 1945. He was ousted from his office by Sir Hartley Shawcross, K.C., M.P. However, the actual conduct of the case for Britain rested on Sir Fyfe.

must be crimes the commission of which was in some way connected with, in anticipation of or in furtherance of the crimes against the Peace or the War Crimes *stricto sensu* with which the Defendants are indicted. That is the qualification which Article 6(c) of the Charter introduces. The considerations which apply here are, however, different to those affecting the other classes of offence, the Crime against Peace or the ordinary War Crime. You have to be satisfied not only that what was done was a Crime against Humanity but also that it was not purely a domestic matter but that directly or indirectly it was associated with crimes against other nations or other nationals, in that, for instance, it was undertaken in order to strengthen the Nazi Party in carrying out its policy of domination by aggression, or to remove elements such as political opponents, the aged, the Jews, the existence of which would have hindered the carrying out of the total war policy ... That is of course a very important qualification, and is not always appreciated by those who have questioned the exercise of this jurisdiction ... The nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilisation to say that these things, even if done in accordance with the laws of the German State

as created and ruled by these men and their ringleader, were when committed with the intention of affecting the international community - that is in connexion with the other crimes charged - not mere matters of domestic concern but crimes against the law of nations. I do not minimise the significance for the future of the political and jurisprudential doctrine which is here implied. Normally international law concedes that it is for the State to decide how it shall treat its own nationals, it is a matter of domestic jurisdiction. Andalthough ... the Charter of the United Nations Organisation does recognize this general position. Yet international law has in the past sought to claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind. Grotius, the founder of international law, had some notion of that prineiple when ... he described as just a war undertaken for the purpose of defending the subjects of a foreign state from injuries inflicted by their ruler".[111]

---

111. Quoted from Calvocoressi, op. cit., pp. 58-59.

Mr. Justice Robert H. Jackson, the American prosecutor at Nuremberg, advanced a little farther when he said: "These Nazi persecutions, moreover, take character as international crimes because of the purpose for which they were undertaken". Further, he said: "Certainly few oppressions or cruelties would warrant the intervention of foreign powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes".[112]

Furthermore, crimes against humanity have later been codified in a more specific and independent way under the concept of "Genocide".[113] However, the Charter of the IMT limited crimes against humanity to those "in execution or in connexion with any crime within the jurisdiction of the Tribunal".[114] Consequently, the Tribunal declined to declare that acts of the character described in Article 6(c) of the Charter committed before 1 September 1939, to be crimes against humanity. The Tribunal had, therefore, no difficulty in finding that crimes against humanity in

---

112. Quoted in Calvocoressi, ibid., p. 89.

113. It is noteworthy that the concept of 'Genocide' according to the Genocide convention can be applied to acts done in peace as well as in War. See Chapter V.

114. Article 6(c) of the Charter of the IMT at Nuremberg.

this narrow sense were crimes under customary international law at the time they were committed.[115] It said: "In sofar as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of or in connexion with the aggressive war and therefore constituted crimes against humanity".[116]

Crimes Against Peace in the Tokyo Trial

The Indictment submitted before the International Military Tribunal for the Far East at Tokyo was, to some extent different from the model at Nuremberg. The most apparent departure was the spelling out of each of the criminal acts directed toward or in furtherance of an aggressive war as separate crimes and setting them forth in separate Counts. Again, in the Indictment at Tokyo the particulars in support of the Counts were not included in the main text but were placed in five appendices to the Indictment.[117]

The body of the Indictment contained fifty-five Counts divided into three groups. Group One (Counts 1 to

---

115. Kilmuir, op. cit., p. 14.
116. Trial of the Major War Criminals, Vol. XXII, op. cit., p. 467, Also see Chapter IV.
117. Horwitz, Solis, "The Tokyo Trial", International Conciliation, September 1950, No. 465, p. 488.

36), was entitled "Crimes Against Peace"; Group Two (Counts 37 to 52), bore the designation "Murder"; and Group Three (Counts 53 to 55), carried the title "Other Conventional War Crimes and Crimes Against Humanity".

Crimes against Peace has also been defined in Article 5(a) of the Charter of the IMTFE at Tokyo. The relevant portions of the Charter reads as follows :

"Article 5. Jurisdiction over Persons and Offences.

"The Tribunal shall have the power to try and punish Far Eastern War Criminals who as individuals or as members of organisations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;...".[118]

---

118. Article 5(a) of the Charter of IMTFE at Tokyo.

The Nuremberg Tribunal had no exclusive jurisdiction to try and punish criminals as individuals or as members of organisations "charged with offences which include Crimes against Peace", as enjoyed by the Tokyo Tribunal.[119] The Tokyo Charter, on the other hand, did not declare any organisation or group to be "criminal organisations" as did Articles 9 and 10 of the Nuremberg Charter. No Japanese organisations were indicted.[120] The Tokyo Charter made an advancement in the definition of Crimes against Peace, over and above the corresponding definitions in the Nuremberg Charter, by including "declared or undeclared war of aggression" and "violation of international law", which, no doubt extended the jurisdiction of the Tokyo Tribunal.

Counts 1 to 5 in Group One of the Indictment at Tokyo were Conspiracy Counts with respect to Crimes against Peace, and charged conspiracies to wage wars of aggression and wars in violation of international law, treaties, agreements, and assurances.[121]

The existence of the over-all conspiracy as alleged in Count I was indeed "the basic matter of transcendent

---

119. Woetzel, op. cit., pp. 228-229.

120. Ibid., p. 229.

121. Horwitz, "The Tokyo Trial", op. cit., pp. 496-499.

importance" in the entire case.[122] This Count, which covered the entire scope of Japanese aggression, charged that the accused from 1 January 1928 to 2 September 1945 had entered into a broad continuing conspiracy the object of which was "that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon, and for that purpose should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose".[123]

This Count charged that there had been one single gigantic conspiracy to wage all the aggressive wars fought by Japan from 1931 to 1945. Mr. Keenan, in opening the case for the prosecution, proceeded to define and explain conspiracy, saying, "The first offence charged in the indictment is conspiracy. Since this offence is merely

---

122. International Military Tribunal for the Far East - Dissentient Judgment of Justice R.B. Pal, Sanyal and Co., Calcutta, April 1953, p. 188.(Hereafter referred to as Dissentient Judgment of Justice Pal).

123. Horwitz, "The Tokyo Trial", op. cit., p. 499.

named and not defined, some definition must be made".[124] The prosecution in Count I alleged a general over-all conspiracy "covering not only the whole period but also all the various phases which subsequently developed although their details might not in the beginning have been foreseen".[125] Furthermore, this Count alleged that the accused participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy. In order to establish the existance of the conspiracy alleged in the indictment, the prosecution offered to prove the common design and contended that once the common design was established, all the evidence, regardless of how disconnected it might seem to be, or regardless of how disconnected the actions of the various defendants might seem, would fall easily into its proper and logical sequence.

In its opening statement the prosecution proposed to establish the following materials which, according to

---

124. Dissentient Judgment of Justice Pal, op. cit.,p.11.

125. Ibid., p. 177; The Prosecutors at Tokyo were:- Australia - Justice Alan James Mansfield and Col. Thomas Mornane; Canada - Brigadier Henry Grattan Nolan; China - Judge Chechun Hsiang; France - Robert Oneto; Great Britain - Arthur S. Comyns-Carr; India- Govinda Menon; Netherlands - Justice W.G.F.Borgerhoff-Mulder; New Zealand - Brigadier Ronald Henry Quilliam; Philippines - Major Pedo Lopez; Soviet Union - Minister S.A. Golunsky and Major General of Justice A.N. Vasilyev.

it, would evidence the factum probandum, (the over-all conspiracy):

1. That for years prior to January 1, 1928, the military in Japan had sponsored, organized and put into effect in the public-school system of Japan programme designed to instil a militaristic spirit in the youth of Japan and to cultivate the ultra-nationalistic concept that the future progress of Japan was dependent upon wars of conquest;

2.(a) That as a result of her previous aggressive policy, Japan had acquired vast interests and privileges in China, particularly in that part known as Manchuria;

(b) That by the special treaties Japan had acquired large areas in Manchuria in which she exercised extra-territorial powers;

(c) (i) That in 1927 the Japanese Government formulated a positive policy toward China which resulted in sending troops to China in May 1927 and in April 1928;

(ii) That political writers and speakers advocated public support of military action in Manchuria;

(iii) That a plan was developed for the creation of an incident in Manchuria which would supply a basis for

military aggression there. This plan also included the exertion of coercive methods in bringing the Japanese Government into accord with military aims and purposes in Manchuria;

(iv) That on September 18, 1931, a provocative occurrence which has come to be known as 'the Mukden incident' was planned and executed;

(v) That it was followed by immediate military aggression well prepared and on the alert for the occasion, resulting in the occupation of the three north-eastern provinces of China and ultimately in the setting up of a puppet regime there;

(vi) That the real purpose of this invasion was the acquisition of proprietary interest in Manchuria;

3.(a) That Japan, through these accused, gradually extended her aggression to other parts of China;

(b) That throughout, the pattern and design conformed to one simple plan, though the details varied from time to time;

4.(a) That the waging of aggressive warfare against China was aided and facilitated by military groups acting in concert with civilians in securing control of government departments and agencies;

(b) That the power involved in the Imperial Ordinance of 1936 providing that the Minister of War must be a General or Lt. General on the active list and that the Minister of Navy must be an admiral or vice-admiral on the active list, was utilized by the Army in obtaining domination and control of the Government and promoting Japan's policy of expansion by force;

(c) That taking advantage of the express provisions of the Japanese Constitution making a sharp distinction between matters of general affairs of state and matters pertaining to the Supreme Command under the Army and Navy, the conspirators, throughout the life of the conspiracy, constantly tended to enlarge the scope of matters contained within the concept of Supreme Command at the expense of matters belonging to general affairs of state;

(d) (i) That militaristic cliques and ultra-nationalistic secret societies resorted to rule by assassination and thereby exercised great influence in favour of military aggression;

(ii) That assassinations and threats of revolt enabled the military branch more and more to dominate the civil government until on October 1941, the military acquired complete and full control of all branches of the Government, both civil and military;

(iii) That the military hierarchy caused the fall of the Yonai Cabinet in July 1940, in order to advance aggressive object;

5. That determination on the part of Japan and those responsible for Japanese policy to continue the programme of expansion by force would be evidenced by

(a) withdrawal of Japan from the League of Nations;

(b) decision not to adhere to the London Naval Treaty;

(c) refusal to attend the Nine-Power Treaty Conference at Brussels;

(d) fortification of mandated islands in violation of the trust under which she obtained them;

6.(a) That before committing herself to extensive military aggression against China in 1937, Japan sought and obtained an alliance with Germany on 25 November 1936 (Anti-Comintern Pact) and entered into a secret treaty with Germany;

(b) That in order to enable her to further aggression, Japan concluded the Tripartite Treaty with Germany and Italy on 27 September 1940;

7. That from the early days of conspiracy Japan had determined to wage war against the United States for the purpose of executing her Greater East Asia Policy;

8. That the ten years of planning and preparation alongwith the period of initiation and waging of war would evidence the details of the conspiracy;

9. That the pattern adopted or accepted by the accused leaders in waging the war was the same as that followed by their fellow-conspirators, the Nazi Germans.

According to the Prosecution the facts stated above have been proved in the case and therefore, they establish the conspiracy alleged in Counts 1 to 5 and show that the said conspiracy "was a continuing one throughout the specified period".[126]

However, at the time of drafting, while the evidence was clear that all Japan's aggressive actions from and after 1935 and 1936 were part of a single common plan, and, while there was already some evidence that the aggression against China from 1931 to 1934 was likewise part of the same conspiracy, the evidence to establish the latter point was too inconclusive to permit complete reliance on one count alleging a single huge conspiracy.[127]

---

126. Dissentient Judgment of Justice Pal, op.cit., pp.185-187.

127. Horwitz, "The Tokyo Trial", op.cit., p. 499. Several documents and witnesses were introduced by the Prosecution to establish the charge of "over-all conspiracy" included in Crimes against Peace.

To make it simple and direct, the charge of over-all conspiracy was broken down into its constituent smaller conspiracies, incorporated into Count 2 to Count 5. Count 2 charged a conspiracy to wage aggressive war against China to obtain domination of Manchuria. Count 3 charged a similar conspiracy against China to obtain domination of the rest of the Republic of China. Count 4 charged a conspiracy to wage aggressive war against the United States, British Commonwealth, France, Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union in order to secure domination of the whole of East Asia and of the Pacific and Indian Oceans. Count 5 charged a conspiracy among the accused, Germany and Italy to wage aggressive wars against all the powers named in Count 4 to secure the domination of the whole world, each aggressor nation having its own special sphere of domination.

Counts 6 to 17 alleged that all the accused "planned and prepared" wars of aggression against Australia, Canada, China, France, India, Netherlands, New Zealand, Philippines, Thailand, Soviet Union, the United Kingdom, and the United States.

All these Counts (i.e. 1 to 17) named all of the accused.

Counts 18 to 26, alleged that certain of the accused "initiated" wars of aggression and wars in violation of international law, treaties, etc., against China, United States, Philippines, British Commonwealth, France, Thailand, Soviet Union and the Mongolian Peoples Republic. And Counts 27 to 36, charged the accused with "waging" wars of aggression and wars in violation of international law, treaties, etc. All of these Counts (i.e. 27 to 36), except 33, 35 and 36, named all of the accused.

Thus, as mentioned earlier, Counts 1 to 36 of the Indictment at Tokyo, dealt with "Crimes against Peace".

'Murder' as a Crime in the Tokyo Indictment

In Group Two of the Indictment at Tokyo, murder or conspiracy to murder was charged in sixteen Counts (i.e. 37 to 52). Counts 37 and 38 charged conspiracies to kill members of the armed forces and civilians of certain of the allied nations and Thailand by the initiation of unlawful hostilities in violation of the Pact of Paris of 27 August 1928, Hague Convention III, and other treaties. Counts 39 to 43 charged certain accused with having committed murder at Pearl Harbour, Kota Bahru, Hong Kong, Davao and abroad H.M.S. Petrol on 7 and 8 December 1941. Count 44 charged the accused with conspiracy to procure

and permit the murder of prisoners of war, civilians and crews of torpedoed ships on a wholesale scale. Counts 45 to 50 charged the murder of disarmed soldiers and civilians of the Republic of China at Nanking, Canton, Hankow, Changsha, Hengyang and Kweilin and Liuchow. Counts 51 and 52 alleged the murder of civilians and members of the armed forces of Mongolia and the Soviet Union in the region of Khalkin-Gol River, and members of the Soviet armed forces at Lake Khassan.

Group Two i.e. Murder, was named as "being acts for which it is charged that the persons named and each of them are individually responsible, being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, contrary to all the paragraphs of Article 5 of the said Charter, to International Law, and to the domestic laws of all the countries where committed, including Japan, or to one or more of them".[128] From the point of view of the development of international penal law these murder counts were the most interesting. The murder charges were not only placed under the "Conventional war crimes and crimes against humanity" as it was done in the Nuremberg Indictment, but also was included in the "Crimes against Peace".[129]

---

128. Dissentient Judgment of Justice Pal, op.cit., p. 11.
129. Horwitz, "The Tokyo Trial", op. cit., p. 500.

Very voluminous evidence was produced by the Prosecution at Tokyo to establish the atrocities actually perpetrated at various places at various times. There were official reports also prepared on an examination of the condition of the returned men. One such recounted "the absence of shelter, the huddled men who were fed like swine on cornbread made from unbolted meal, soup with worms and bugs and mule meat ... Rats were eaten by the starving men - once a dog was eaten - and men were grateful for the scraps thrown to them from the surplus supplies of their guards. The sick were not sent to the hospitals until past recovery, were mistreated by surgeons, and died".[130] Such reports and evidences were produced in large number by the Prosecution, and need not here be cited in detail.

Group Three Charges at Tokyo - "Conventional War Crimes and Crimes Against Humanity".

The Charter of the International Military Tribunal for the Far East contained "Conventional War Crimes" and "Crimes against Humanity" in Article 5(b) and (c) respectively. To quote the relevant portions:

---

130. Quoted in Dissentient Judgment of Justice Pal, op. cit., p. 893.

"Article 5(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan".[131]

This definition differs from the Nuremberg Charter in sofar as the "War Crimes" are not defined in detail as it was defined in Article 6(b) of the Nuremberg Charter. In case of the definition of "Crimes against Humanity" there is more or less, similarity between both the Charters.

The Indictment at Tokyo, however, combined both these crimes in Group Three, and charged the accused with the commission of "Conventional War Crimes and Crimes against

---

131. Article 5(b) and (c) of the IMTFE Charter.

Humanity" included in Counts 53, 54, and 55. Count 53 charged certain specified accused with having "conspired" to order, authorize and permit Japanese Commanders, War Ministry officials, police and subordinates to violate treaties and other laws and customs of war, by committing atrocities and other crimes against many thousands of prisoners of war and civilians belonging to the United States, the British Commonwealth, France, Netherlands, the Philippines, China, Portugal and the Union of Soviet Socialist Republics. Furthermore, this Count also alleged a "conspiracy" to have the Government of Japan abstain from taking adequate steps to secure observance of the Laws and Customs of war and to prevent breaches thereof. Certain specified accused were directly charged in Count 54 with having ordered, authorized and permitted the persons mentioned in Count 53 to commit offences in violation of treaties and other laws and customs of war. The same specified accused were charged in the final count i.e. Count 55 with having violated the laws of war by deliberately and recklessly disregarding their legal duty to take adequate steps to secure the observance of conventions, assurances and the laws of war for the protection of prisoners of war and civilians of the nations and peoples named in Count 53.

The particulars of different crimes of which the Japanese Leaders were accused were mentioned in the five appendices to the Indictment. Appendix A summarised the principal matters and events upon which the Prosecution would rely to establish the commission of the Crimes against Peace classified under Group One of the Indictment. In Appendix B were collected the Articles of Treaties violated by Japan as charged in the counts for Crimes against Peace (i.e. Group One) and the Crime of Murder (i.e. Group Two). In Appendix C were listed official assurances violated by Japan and incorporated in Group One, i.e. Crimes against Peace. Conventions and Assurances concerning the laws and customs of war were discussed in Appendix D, and particulars of breaches of the laws and customs of war for which the accused were responsible were set forth therein. It listed fifteen categories of violations of those obligations. Appendix E was a statement of the individual responsibility of the accused for the crimes charged, setting forth the major offices held by each of the accused together with the record of their attendance at the principal meetings in which Japan's policy of aggression was defined and elaborated.

It may be noticed in this connexion that in the Nuremberg Indictment there were no charges corresponding to those contained in Count 55 of the Tokyo Indictment. The

accused at Nuremberg were all charged with having committed some positive acts of atrocities mentioned in the "War Crimes" charges. But to allege the accused that they "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war"[132] was something unique and novel with the Tokyo Indictment.

The Prosecution at Tokyo presented a wide range of evidences to establish the Conventional War Crimes and Crimes against Humanity. Some of them can be mentioned here:

Dr. Hsu Chuan-ying, one witness, was a Ph.D. from the University of Illinois. He was a resident of Nanking and in December 1937 was connected with the Red Swastika Society. He has given before the Tribunal horrible accounts of the atrocities committed at Nanking, named as the "Nanking rape" incident. He described:

---

132. Count 55 of the Tokyo Indictment. All of the accused, except Okawa and Hashimoto, had held the highest government and military offices. Among them were: Prime Ministers - Hirota, Hiranuma, Tojo, Koiso: Foreign Ministers - Hirota, Matsuoka, Togo, Shigemitsu; War Ministers - Minami, Araki, Itagaki, Hata, Tojo; Navy Ministers - Nagano, Shimada; Finance Minister - Kaya; Education Ministers - Kido, Araki; Home Ministers- Hiranuma, Kido, Tojo; Overseas Ministers - Koiso, Togo; Greater East Asia Ministers- Shigemitsu, Togo; Presidents, Planning Board - Hoshino, Suzuki; Ministers without portfolio - Hiranuma, Hoshino, Suzuki; Chiefs of Army General Staff - Tojo, Umezu; Lord Keeper of the Privy Seal - Kido; President, Privy Council - Hiranuma; Ambassadors - Oshima, Shiratori; Shigemitsu, Togo.

"I see with my very eyes the Japanese soldier raping a woman in a bathroom, and his clothes outside, and then afterwards we discovered the bathroom door, and found a woman naked, and also weeping and downcast.

"... We went to the camp to try to get - to catch two Japanese who were reported to be living there. At the time we reached there we saw one Japanese still sitting there, with a woman on the corner and weeping. I told Fukuda, 'This is the man who did the raping,...."

"Once we caught a Japanese raping, and he was naked. He was sleeping, because then we tied him and we got him to that police office".[133]

John Gillespie Magee,[134] another witness said:

"One woman that I have known for almost thirty years, one of our Christians, told me she was in a room with one

---

133. Quoted in Dissentient Judgment of Justice Pal, op.cit., pp.606-608; After the fall of Nanking on 13 December 1937 within six weeks from 2,60,000 to 3,00,000 persons were murdered without trial, and not less than 20,000 women and girls were raped by Japanese soldiers according to the Prosecution at Tokyo. See, Dissentient Judgment of Justice Pal, ibid., p. 624.

134. Mr. Magee was a Minister of an Episcopal church at Nanking from 1912 to 1940 and was in Nanking through out the month of December 1937 and January and February 1938.

girl and then when the Japanese soldier came in, she knelt before him, begging him to leave the girl alone. He hit her over the head with the flat side of a bayonet and raped the girl.

".... I was called to another house, drove out three Japanese in the woman's quarters on the second floor; and then the Chinese there pointed to a room. I rushed into the room, bursting open the door and found a soldier - a Japanese soldier - in the act of rape. I drove him out of the room".[135]

Mohamed Hassen,[136] August 1945:

"About 700 Indians were taken by sea towards another island (from Andaman and Nicobar Islands). When 400 yards from shore they were forced overboard; all except 203 drowned. The remainder were left on the island without food for fifty days when the Japanese returned".

JAG Report No. 140 (on punitive expeditions on Panama Islands by Japanese forces):

---

135. Quoted in Dissentient Judgment of Justice Pal, op. cit., p. 608.

136. An witness, in support of atrocities committed in the Andaman and Nicobar Islands by the Japanese forces. He was one of the party of 700 and the only one surviving. See ibid., p. 613.

"On October 17, 1943 another punitive expedition arrived at Bataan. All civilians were investigated and ... made to walk through fire. In the morning the Japanese received orders to proceed and 140 civilians including two priests were beheaded by Japanese soldiers".[137]

Liu Chi-yuan, an witness, narrated the incident of one single day as follows :

"On the 21st day of the 12th month (Lunar Calendar), 1941, Japanese troops entered the city of Wei-Yang, Kwangtung. They indulged in a massacre of the Chinese civilians, bayonetting them all, male and female, old and young without discrimination. I was the eye-witness of more than 600 Chinese slaughtered by Japanese troops in such places as the West Lake, Wu Yen Chiao, Shashia, Zai Pu Chang, Ho Bien, Fu Cheng, Chiao Kung, Hsien Cheng, Chiao Si An, the outside of the West Gate and North Gate, Pai Sha. Many others were killed in various other places. Those killed by the Japanese amounted to approximately 2,000 and they were all civilians. I escaped from the city and fled as far as Wu Yang Chaio where ten Japanese stabbed the left side of my abdomen with bayonets. I went through 20 days of medical treatment. The scar on my abdomen is an evidence".[138]

---

137. Dissentient Judgment of Justice Pal, op.cit., p.618.
138. Ibid., p. 625.

A report dated 4 September 1942 from the accused Itagaki as Korean Army Commander to the accused Tojo. This report sets out regulations in use in the Korean POW camps. It included the following:

"Article 2. Not one POW must be left to time in idleness. Allow appropriate labour according to their skill, age and physical strength, thereby using them in industrial development and military labour".[139]

Several such statements, documents and witnesses could be produced as evidences of the atrocities committed by the Japanese, and in fact, were introduced by the Prosecution at the Tokyo trial. But the questions arise: that how far a few Japanese leaders and statesmen could be held responsible for the crimes and atrocities committed on such huge scale? What defence those accused put forth to justify their acts? In what way those defence arguments were in common with the Defence position at Nuremberg?

---

139. Ibid., p. 667; From August 1942 onward, prisoners of war were despatched from Singapore and the Netherlands East Indies to Burma and Siam to construct a railway line from Kanchanburi in Thailand to Thanbuyzayat in Burma for the purpose of supplying Japanese troops in Burma who were preparing to invade India. The total distance was about 400 kms. In all, about 46,000 POWs were employed and, of these, 16,000 died in a period of 18 months from starvation, disease and ill-treatment. Japanese sources place the maximum number of prisoners employed at 49,776 and the deaths at 7,746. In addition, from 1,20,000 to 1,50,000 Indonesians, Burmese, Chinese and Malayans were employed and their death-roll from the same causes was estimated at 60,000 to 1,00,000. See ibid., p. 668.

In view of the "fair trial" of the defendants, the Prosecution arguments and the defence position must be weighed equally. The next Chapter, therefore, attempts to highlight the Defence contentions both in the Nuremberg and Tokyo Trials.

CHAPTER III

DEFENCE PLEAS AND THE SUBJECTAL STATUS OF THE INDIVIDUAL

Criticisms of the Trials

It has been seen in the preceding Chapter that various atrocities, massacres, executions and other crimes were committed by the German and Japanese "major war criminals" during the second World War.

But several criticisms were voiced and objections were raised against their trial. The Defence Counsel in both Nuremberg Trial and Tokyo Trial raised certain fundamental legal objections to the Trials, whereas critics condemned them as a "wreaking of vengeance by the perversion of justice", and as a "trial of the vanquished by the victors".[1]

Various questions were raised concerning those trials, such as, whether the so-called International Military Tribunals have any right or jurisdiction to embark on the hearing of the matter before them or can they try such cases? How far the acts complained are

---

1. Taylor, Telford, "The Nuremberg War Crimes Trials - An Appraisal", Proceedings of the Academy of Political Science, Vol. XXII (1948-1950), New York, 1950, p. 239.

criminal and in which way they are contrary to the International Law? Who are to be responsible for those acts?[2]

This chapter, therefore, examins the constitution, jurisdiction, procedure, and the law applied in the Nuremberg and Tokyo trials from the point of view of objections and criticisms raised against them.

Defects of the Nuremberg Charter

The Moscow Declaration of November 1, 1943, jointly issued by Roosevelt, Churchill and Stalin[3] stated that those whose offences had no particular geographical location "will be punished by a joint decision of the Governments of the Allies".[4] Clearly this phrase was not an appeal to existing international law.[5] Demoralising titles and languages were used against the accused long before they were tried. For example, in February 1943, just after the Casablanca Conference, they were described by the leading

---

2. Calvocoressi, Peter, Nuremberg - The Facts, the law and the Consequences, The Macmillan Company, New York, 1948, pp. 11-12.
3. See Chapter I.
4. 9 U.S. Department of State Bulletin, 1943, pp. 310-311.
5. Maugham, Viscount, U.N.O. and War Crimes, John Murray, London, First Edition, 1951, p. 25.

Allied statesmen as "the wicked and the guilty" and as "the guilty and barbaric leaders". At the Moscow Conference (October 1943), at Yalta (February 1945), at Berlin (August 2, 1945) and in the Nuremberg Charter they were branded as "major war criminals". All such pronouncements were detrimental to the accused.[6] Even at the London Conference of June 1945, the Russian representative, who later became one of the Judges at Nuremberg,[7] insisted that "the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment - the sentences".[8] These statements militated against the fairness of the trials and, even worse politically, aroused mistrust as to their genuineness[9]".

It has been argued that the Nuremberg Charter "as drawn did not found its provisions on the rules of international law: they formulated on their own authority, the provisions which they thought would be just and proper in the Trial of the Major War Criminals".[10] Furthermore, it is

---

6. Ibid., p. 110.

7. Major-General Nikitchenko, See Chapter I.

8. See U.S. Department of State Publication No. 3080, 1949, p. 303.

9. See Maugham, op.cit.,(Postscript by Lord Hankey),p.111.

10. Ibid., p. 18.

argued that since the Law of Nations came into existence, there had never been a case where any individual has been tried for the alleged crime of participating in the waging of an aggressive war or a war in violation of an international treaty, and no Nation had ever before asserted that such an act was a crime under international law.[11] A rule of law governing all nations cannot spring into existence at the will of any four nations[12] or of any four or more lawyers selected from those nations. Professor Gros for France, an expert in international law, and an associate of Robert Falco in the London Conference of 1945, said: "That is shocking. It is a creation by four people who are just four individuals ... Those acts have been known for years before and have not (hitherto) been declared criminal violations of international law. It is ex post facto legislation".[13] The Charter has been, therefore, described as a "political instrument" of the Allies.[14]

The Charter in framing the "Crimes Against Peace" with its monstrously wide phrases, and in particular with

---

11. Ibid.

12. The four Allied nations represented by the four leading persons who attended the London Conference on 26 June, 1945. See Chapter I.

13. Quoted from Maugham, U.N.O. and War Crimes, op.cit., p. 33.

14. See Maugham, ibid., p. 34.

the word "waging" following the words planning, preparation, and initiation, so as to include everyone, and finishing with the word "aggression",[15] does not discriminate between the real authors of the War and mere participators in it.[16]

Moreover, the meaning of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population",[17] as defined in the Crimes Against Humanity is not clear. Perhaps no offence could be considered as being "committed against any civilian population" if it was an isolated offence or was not governmentally organized or approved.[18]

The gravest mistake in the Charter was said to be in attributing participation in an aggressive war or a war in breach of treaties a terrible crime punishable by the most serious of all penalties. In doing so it made "the entire German people guilty by definition"[19] including the rich and poor, educated and scarcely able to read or write, filling an important role in the war or acting merely as humble pawns pushed about wherever they were ordered, men

---

15. Article 6(a) of the Nuremberg IMT Charter.

16. Maugham, op. cit., p. 40.

17. Article 6(c) of the Nuremberg IMT Charter.

18. Brand, G., "The War Crimes Trials and the Laws of War", British Yearbook of International Law, Vol.XXVI, 1949, p.422.

19. Mr. Justice Jackson's words during the London Conference, U.S. Department of State Publication No. 3080, (Jackson Report), p. 304.

with no real option to decline the duties which were placed on them, and with "little chance of keeping their wives and children alive if they refused to obey".[20]

The question arises whether the Allied nations had any authority to draft such a Charter. Glueck said, "there is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a Charter".[21]

The IMT - Objections and Criticisms

The Tribunal at Nuremberg has been criticised on several grounds. The first and the most important charge against the Tribunal was that it was a court of the victors and its judges were citizens of the victorious powers, whereas the accused were citizens of the vanquished nations and therefore, there would be "adverse interest"[22] between the judges and the accused. In this connexion the forcible remarks of Professor Donnedieu de Vabres, a Judge of the

---

20. Maugham, op. cit., p. 39.

21. Quoted from Pal, R.B., International Military Tribunal For The Far East - Dissentient Judgment, Sanyaland co., Calcutta, 1953, p. 30. (Hereafter referred to as Pal-Dissentient Judgment).

22. See Taylor, Telford, "The Nuremberg War Crimes Trials," International Conciliation, No. 450, April 1949, pp. 336 - 337.

Nuremberg Tribunal, at the Committee on the Progressive Development of International Law as the representative of France, is emphatic. He said that as a Judge at the Tribunal he was very much alive to criticism of the Nuremberg Judgment on the ground that the Tribunal was composed only of representatives of victor countries and did not represent the international community. The defective composition of this Tribunal proved, in his opinion, that it would be necessary to establish a truly international criminal court.[23] Similarly, Calvocoressi observed that "a purely German trial was neither practicable nor desirable in 1945, it remains true that the presence of a German judge sitting side by side with the judges appointed by the four victors might have added something to the value of the proceedings".[24]

The second criticism levelled against the IMT was that it was constituted by captors who created the law, prepared the indictments, brought forward the evidence, conducted the prosecution, and judged the accused. This is contrary to all judicial procedures. The defence counsel at Nuremberg while presenting its case said "the Defence consider it their duty to point out at this juncture another

---

23. Maugham, op. cit., p. 46.

24. Calvocoressi, Nuremberg - The Facts, the Law and the Consequences, op. cit., p. 21.

peculiarity of this trial which departs from the commonly recognized principles of modern jurisprudence. The judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one: creator of the Statute of the Tribunal and of the rules of law, prosecutor and judge. It used to be until now the common legal conception that this should not be so; just as the United States of America, as the champion for the institution of international arbitration and jurisdiction, always demanded that neutrals, or neutrals and representatives of all parties, should be called to the Bench. This principle has been realized in an exemplary manner in the case of the Permanent Court of International Justice at the Hague".[25]

The third objection raised against the Nuremberg Tribunal, notably by German authors, was against its "International" character. It was contended that a tribunal need not

---

25. This motion was adopted by Dr. Stahmer, on behalf of the attorneys for all defendants who were present on 19 November 1945. The Tribunal rejected this motion on 21 November 1945, ruling that insofar as it was a plea to the jurisdiction of the Tribunal it was in conflict with Article 3 of the IMT Charter which reads, "Neither the Tribunal, its members nor their alternates can be challanged by the Prosecution, or by the Defendants or their Counsel". The Trial of The Major War Criminals before The International Military Tribunal, Nuremberg, 1947, Vol. I, pp. 169-170; Also see Kelsen, H., "Will the judgment in the Nuremberg Trial Constitute a precedent in International Law?" International Law Quarterly, 1947, pp. 167-171.

be considered international and binding on states which were not contracting parties to the treaty or agreement that forms its basis. From this point of view the IMT would not be an international court as far as Germany was concerned, since no German Government subscribed to the Charter nor gave its consent to its jurisdiction over German nationals. The unconditional surrender of Germany cannot be construed, even indirectly, as giving such consent. A treaty between several states by itself would not be an uncontested basis for an international court. A tribunal set up under such an agreement would only be entitled to the combined powers of jurisdiction of the contracting parties, but no more. It could not, for instance, try the Acts of State of a non-contracting State.[26]

The fourth criticism against the Nuremberg Tribunal was, however, against its "ad hoc" nature. It has been said that the Tribunal was "a special court to try a specified class of persons", which was a "judicial anamoly" and contrary to the legal principles and practices of most States.[27] Also, it has been stated that some Allied nationals were just as guilty of certain war crimes as the German

---

26. Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens and Sons Ltd., London, 1960, pp. 42-43.

27. Ibid., p. 46; Also Calvocoressi, Nuremberg - The Facts, the Law and the Consequences, op. cit., p. 26.

leaders prosecuted at Nuremberg, but they never allowed these to be tried by the IMT or a similar tribunal. As Mr. Justice Jackson admitted that,[28] "if it is a crime for Germany to do this, it would be a crime for the United States to do it". As a result, the German leaders were debarred from raising the valuable "tu quoque" argument, which could have been that the Allies had committed many of the crimes or equally serious ones themselves.[29] Goering, one of the accused said before the Tribunal that, "International law is uniform. The same must apply to both sides. Therefore, if everything which is being done in Germany today on the part of the occupying powers is admissible under international law, then Germany was formerly in the same position, at least as regards France, Holland, Belgium, Norway, Yugoslavia, and Greece. If today the Geneva Convention no longer has any validity so far as Germans are concerned, if today in all parts of Germany industry is being dismantled and other great assets in all spheres can be carried away to the other states, if today the property of millions of Germans is being confiscated and many other serious infringements on freedom and property are taking place, then measures such as those taken by Germany in the

---

28. This he said in the London Conference, on July 24,1945. See Maugham, U.N.O. and War Crimes, op.cit., p. 116.

29. Ibid., p. 116.

countries mentioned above can not have been criminal according to international law either".[30]

Fifthly, it has been furthermore, doubted that whether one state or a group of states can act as agents of the family of nations under international law. In the Moscow Declaration of November 1, 1943, the Allied leaders declared that they are "acting in the interest of the United Nations and had right to legislate".[31] Similarly the preamble of the London Agreement of August 8, 1945, also declared that the four Allied powers in making the Agreement are "acting in the interests of all the United Nations..."[32] This has been criticised by writers who declare that not every state or group of nations can assume that it is acting for the international community. This would lead to chaos in international relations, and constant conflicts between the jurisdiction of States. By stating that they are agents of the family of nations, some countries might take jurisdiction over cases that are completely unrelated to their sovereign sphere of interest.[33]

---

30. The Trial of The Major War Criminals before The International Military Tribunal, Nuremberg, 1948, Vol.XXII, p. 387.

31. Article 5 of the Moscow Declaration; See Quincy Wright, "The Law of the Nuremberg Trial," American Journal of International Law, Vol. 41, 1947, p. 51.

32. Ibid., p. 51.

33. Woetzel, Robert K., The Nuremberg Trials in International Law, op. cit., p. 60.

The ex post facto Argument

The defence counsel at Nuremberg raised one important legal argument that there is no crime without pre-existing law. Some writers maintain that it is not permissible under international law to hold an individual criminally responsible for an act, unless it had been stigmatised as a crime with a penalty affixed to it in law at the time of its commission.[34] Furthermore, it has been said that there is no international legislature which can, by statutory process, define international crimes, prescribe penalties, and establish judicial machinery for the enforcement of international law.[35] From this circumstance stem the objection derived by Continental lawyers under the famous maxim nullum crimen sine lege, nulla poena sine lege praevia, and raised by American lawyers by analogy from the ex post facto clause of the Constitution.[36] It has also been

---

34. Ibid., pp. 110-111.

35. Taylor, "The Nuremberg War Crimes Trials", International Conciliation, op. cit., p. 336.

36. Ibid., p. 336; This rule was recognized in ancient Roman times, and has been affirmed at various times in history. Until the 17th. and 18th. centuries, it was not introduced into the Continental European system of law. Modern formulation of this rule is attributed to Anselm Feuerbach, and Blackstone(England). It has been incorporated into many constitutions, including the U.S.(Art.1,S.9,cl.3,and S.10,cl.1),and the German Constitutions. Also this rule is contained in the U.N. Declaration of Human Rights(Art.11,No.2) and recognized by the P.C.I.J. in an Advisory opinion on the use of analogy in the criminal law of Danzig. See Woetsel,The Nuremberg Trials in International Law,op.cit.,pp.111-112.

maintained that this principle is valid in international law as in national law.[37]

In raising the ex post facto argument the Defence counsel at Nuremberg said, "The present Trial can, therefore... not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, ... This principle is to the effect that only he can be punished who offended against a law in existence at the time of the Commission of the act and imposing a penalty. ... This maxim is precisely not a rule of expediency but it derives from the recognition of the fact that any defendant must needs consider himself unjustly treated if he is punished under an ex post facto law. ... The Defence are also of the opinion that other principles of a penal character contained in the Charter are in contradiction with the maxim, Nulla Poena Sine Lege." [38]

---

37. Ehard, H., "The Nuremberg Trial against the Major War Criminals and International Law". American Journal of International Law, Vol.43, 1949, p. 231.

38. The Trial of the Major War Criminals before The International Military Tribunal, Vol. 1, 1947, op. cit., pp. 168-170; Also see Wright, Quincy, "War Criminals", American Journal of International Law, (Supplement), Vol. 39, 1945, p. 257.

To sum up, therefore, it was urged on behalf of the defendants that a fundamental principle of all law - international and domestic - is that there can be no punishment of crime without a pre-existing law. It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed; that no statute had defined aggressive war; that no penalty had been fixed for its commission; and no court had been created to try and punish offenders. Those long and learned arguments before the Tribunal based on the maxim Nullum crimen, nulla poena, sine lege really came down to the proposition that the defendants could not be punished for acts which had not been specified as being criminal by legislation. No one would deny the fact that it is ex post facto and bad to legislate in order to make criminal that which was not a crime when committed.[39]

Article 1 of the Constitution of the U.S.A., provided that "no ex post facto law shall be passed" by the Congress and "no state shall ... pass any ex post facto law". The Defence Counsel urged, therefore, that this maxim "is one of the great fundamental principles of the political systems

---

39. Kilmuir, Viscount, Nuremberg in Retrospect, Presidential Address, The Holdsworth Club of the University of Birmingham, 1956, p. 10.

of the Signatories of the Charter for this Tribunal themselves, to wit, of England since the Middle Ages, of the United States since their creation, of France since its great revolution, and the Soviet Union".[40] Furthermore, the Control Council for Germany enacted a law to assure the return to a just administration of penal law in Germany, it decreed in the first place the restoration of the maxim, "No punishment without a penal law in force at the time of the commission of the act".[41] It was, however, claimed that punishment under an ex post facto law would be a deviation from existing international law and utter disregard of a commonly recognized principle of modern penal jurisprudence.

Moreover, it has been maintained that so long as the prisoners are placed on trial before an 'International Tribunal', it does not matter whether as prisoners of war by the victor state, or, as its citizens by the vanquished state, neither state can legislate so as to give any ex post facto law to be applied by that 'International' tribunal in order to determine their crime.[42]

According to Lord Hankey, "However desirable ethically such trials may have been it would seem that here again we

---

40. The Trial of the Major War Criminals before The International Military Tribunal, Vol. 1,1947, pp.169-170.

41. Ibid., p. 169.

42. Pal, Dissentient Judgment, op. cit., p. 29.

have crests crimes made ex post facto and contrary to human rights", and "If enemy leaders can be tried for their lives for not knowing that their actions or omissions were liable to be made crimes ex post facto, what are we to say of legal luminaries who did not know or forget that they were transgressing the elementary rights of human beings in their planning, preparation, initiation and execution of the trials".[43]

The Defence of Superior Orders

Another very important argument that is often cited against individual responsibility for international crimes and that was raised by the Defence Counsel at Nuremberg is that a person cannot be punished for an act which he committed in pursuance of superior orders.

Articles 7 and 8 of the Charter of the IMT at Nuremberg reads as follows :

"Article 7. The official position of Defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

---

43. Maugham, U.N.O. and War Crimes, op. cit., (Postscript by Lord Hankey), pp. 118,120.

"Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[44]

These provisions of the Charter has caused some heart-burning in service quarters and has also evoked disquiet in the mind of the ordinary reasonable man. Everyone is conscious that in any army worth the name a soldier must obey orders at once and without hesitation, and it seems unfair that he should at the same time be liable to severe punishment if these orders cause him to commit a breach of the laws of war.[45]

It has been said that in pursuance of Article 7 of the Charter, if a Defendant, whether a Head of State or a responsible official in a Government Department (e.g., the Postmaster General or a high railway official) was found, as was almost inevitable, to have participated in waging the war, he was to be deemed guilty and sentenced to death or other punishment without any chance of mitigation of sentence because of his official position. Article 8 of the Charter, however, dealt not with persons of high position,

---

44. Article 7 and Article 8 of the Charter of the IMT at Nuremberg.

45. Kilmuir, Nuremberg in Retrospect, op.cit., pp. 14-16.

but with superior orders given to and relied upon by any defendant irrespective of his position. This was not to be considered a defence, but might be accepted as a plea in mitigation. The Charter did not directly provide for mitigation of punishment, rather declared that it "may" be considered in mitigation. Neither did the Charter provide for acquittal, when the Defendant could show that "moral choice" was in fact not possible.[46] Therefore, it is argued that the provisions of Articles 7 and 8 of the Charter were flagrantly unjust, especially if, in the future, they were applicable to a humbler class of defendants than those who alone were being tried by the Tribunal. The principles of those two Articles, it was contended, were a departure from justice.[47]

To take an extreme case, an order to soldiers far from a battlefield to fall in for a parade or to march in the ranks or to clean up outhouses, would be a crime, and a soldier who complied with such an order would be a criminal under Article 6 of the Charter (particularly, Aggressive war). The same result would follow in the case of many of the soldiers, sailors and airmen, who, not being authors of the war, took part under the orders of superiors

---

46. Maugham, U.N.O. and War Crimes, op.cit., pp.45,47,48.

47. Ibid., p. 48.

in the ordinary operations of war. They would have been tried and sentenced as deserters if they had refused to remain in the line of battle.[48]

Section 443 of the British Military Manual of the Laws and Usages of War on Land prior to May 1944 contained: "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Governments or by their commander are not war criminals and can not therefore be punished by the enemy".[49] Similar provisions were also mentioned in Section 366 of the United States Rules of Warfare during the Second World War until November 1944.[50] This old military rule, which had stood the test of the two great wars in the British history to the satisfaction of friend and foe alike, was scrapped in May 194[illegible]; it was superseded by the draft of an international

---

48. Ibid., p. 48.

49. Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes", British Yearbook of International Law, Vol. XXI, 1944, p. 69.

50. Ibid., Also Oppenheim, L., International Law, Vol.II., Seventh Edition, 1952, note 1, p. 568; The new German Military Code of 1940, stipulated that while the superior is responsible for violations of penal law, the person executing a superior order may also be punished "if he has known that the order of the superior referred to an act which had as its purpose a general or military crime or misdemeanor". See Schick, F.B., "The Nuremberg Trial and the International Law of the Future", American Journal of International Law, Vol.41, 1947, p. 792.

lawyer working on war crimes trials, after he had shown that, unless the rule was changed, the prospect of bringing to justice any substantial portion of the offenders would indeed be slender. The jurist's new rule was intended to hamper defendants at the then projected war crimes trials in pleading obedience to superior orders as a defence. Furthermore, it was intended to prevent the defendants from supporting the plea by pointing to the extent to which the fighting services of the Allies had relied on the old rule as a safeguard against punishment in case of Capture. There were, however, no military advantages to compensate the dangers to discipline, which may prove serious.[51] The amendment was denounced by high ranking officers of the British fighting services and other speakers in the House of Lords as inimical to service discipline and unjust to the personnel of the fighting forces under active service conditions.[52]

Paragraph 345 of the United States Rules of Land Warfare was also revised on November 15, 1944, in favour of obedience to lawful orders or commands only.[53] Perhaps nothing has done more to increase the dislike of war crimes trials in the fighting services than this gerrymandering of their regulations.[54] Professor Lauterpacht said: "Acts with regard

---

51. Maugham, U.N.O. and War Crimes, op.cit., (Postscript by Lord Hankey), p. 111.

52. Ibid.

53. Oppenheim, International Law, Vol.II(7th Edn.), op.cit., note 1., p.568; Also see Schick, "The Nuremberg Trial and the International Law of the Future", op.cit., p.792.

54. Maugham, U.N.O. and War Crimes, op.cit., p.113.

to which prosecution of individuals for war crimes may appear improper owing to the disputed nature of the rules in question arise largely in connexion with military, naval and air operations proper ... An international tribunal may find that the (Superior) order was illegal. But any justifiable element of doubt, however ill-founded, preliminary to such a finding must weigh with particular force in the decision of the court to dismiss the plea of Superior orders. ... The subordinate may be expected, when confronted with an order utterly and palpably contemptuous of law and humanity alike, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting though unavoidable test".[55]

Someone may say, that is all very fine in theory but will it ever work in practice? It was, however, argued on behalf of the defendants at Nuremberg, that "to allow oneself to be hanged merely to evade one's duties, to betray one's country without any prospect of being able to change matters - these things can not be demanded by virtue of any morality. After all, there is no obligation for anybody to become a martyr".[56] The subjectal status of the individual would be

---

55. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", op. cit., pp. 75-76.

56. The Trial of the Major War Criminals before The International Military Tribunal, Nuremberg, 1948, Vol.XXII, p. 83.

sandwiched between his duties on the one hand, and his right to refuse unlawful orders on the other. Therefore, it was contented that "the German military leaders found themselves hemmed in between their rights as men and their duties as soldiers".[57] Furthermore, it was argued that "the Fuhrer order was not only a military order, but that it had, over and above this, a legislative effect".[58] Thus, if the argument is recognized that the leadership principle in the Third Reich made Hitler responsible for all actions of his subordinates, as claimed by various defence counsel at Nuremberg, and if Hitler is regarded as a person acting in his official capacity as Reichschancellor and his orders must be regarded as Acts of State, then no one could be held responsible for criminal acts, except perhaps the German State as a whole. The Respondeat superior argument holds that the superior should be held responsible for an act of a subordinate, or responsibility for an act is disclaimed by the actor and attributed to the superior in command.[59] To quote Appleman, "let the master answer, rather than the servant",[60] is probably the most appropriate explanation made in this regard.

---

57. Ibid., p. 88.
58. Ibid., p. 83.
59. Woetzel, Robert K., The Nuremberg Trials in International Law, op. cit., note 31, p. 68.
60. Appleman, J.A., Military Tribunals and International Crimes, Indianapolis, 1954, p. 64.

Oppenheim contends that: "Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter can not, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals".[61]

'Acts of State' - The Defence Plea

Another argument raised during the Nuremberg Trials which had direct impact on the subjectal status of individual in international law, is the doctrine of "Acts of State". This doctrine is based on the rule par in parem non habet imperium, which means that a sovereign State has no dominion over, and does not sit in judgment upon another sovereign State. One fundamental principle of international law is that all States are juridically ranked equal to each other,

---

61. Oppenheim, International Law, Vol. II (7th Edn.), op. cit., para 253, pp. 568-569.

and no State is subject to the jurisdiction of another State.[62] Deduced from this "Acts of State" principle claims that individuals can not be prosecuted by a foreign government for violations of international law which they committed in exercise of official duties. The courts of an injured state are not entitled to take jurisdiction over such violations. Furthermore, persons who are responsible for Acts of State claim the additional protection of immunity.[63]

It is clear, therefore, that an individual can not be made responsible for an act which he performed as an instrument or "organ" of his state, since responsibility for such violations rests on the "collectivity of individuals", which is the state.[64]

A case which is often cited as a basis for this doctrine is the Schooner Exchange v. McFaddon decided by the U.S. Supreme Court in 1812. In this case an American warship had been seized by the French while on the high seas, and converted into a French public armed vessel. As a result of rough weather, she later had to seek refuge in the harbour of Baltimore, in order to make necessary repairs

---

62. Woetzel, The Nuremberg Trials in International Law, op. cit., p. 67.

63. Ibid.

64. Ibid., p. 68.

and lay in supplies. Before her departure, she was seized by U.S. authorities on application of the former owners. The Supreme Court held that the Schooner must be released in consideration of "the exemption of the sovereign and the sovereign agent of a state from judicial process".[65] Chief Justice Marshall in his decision recognized a class of cases "in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation ... One of these is admitted to be the exemption of the person of the sovereign (or his agent) from arrest or detention within a foreign territory".[66]

Similarly in The People v. McLeod case, in which an American citizen had been killed as a result of the action of a British force in 1837 against the American steamer "Caroline" while she was moored on the American side of the Niagara River. The British officer McLeod was later arrested in the State of New York, and indicted for the killing. He was tried and acquitted on proof of an alibi.[67] In this case, Secretary of State Webster wrote to Attorney-General

---

65. Ibid., note 28, pp. 29-30; See also Moore, J.B., A Digest of International Law, Washington, 1906, Vol.II, para 175, p. 4.

66. Woetzel, ibid., pp. 68-69.

67. Woetzel, ibid., note 33, p. 68; Also Moore, op.cit., Vol.II, 1906, p. 26.

Crittenden on March 15, 1841, that: "All that is intended to be said at present is, that since the attack on the Caroline is avowed as a national act, which may justify reprisals, or even general war ... yet that it raises a question entirely public and political, a question between independent nations; and that individuals connected in it can not be arrested and tried before the ordinary tribunals, as for the violation of municipal law".[68]

Kelsen, among others, who supports the Acts of State doctrine says that 'Acts of State' are "imputed to the State, not to the individual who has performed the act"; and obviously this means that the sanctions provided by general international law for violations of international obligations committed as 'Acts of State' imply "Collective, not individual Responsibility".[69] Furthermore, he says: "prosecution of an individual by a court of the injured state for an act which, according to international law, is the act of another state, amounts to exercising jurisdiction over another state; and this is a violation of the rule of general international law that no state is subject to the jurisdiction of another state".[70]

---

68. Woetzel, Ibid., p. 69.

69. Kelsen, Hans, Peace Through Law, 1944, p. 81.

70. Ibid., p. 82.

Similar opinion was stated in the Report adopted by the Committee of Experts for the Progressive Codification of International Law at its third session, March-April 1927, Rapporteur Matsuda, that :"In disputes between a foreign state and a private individual ... its submission to the municipal jurisdiction is only comprehensible in matters of pure private law - that is to say when it does not appear as a sovereign Power asserting its right as a public authority. The inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign government ... should apply where the defendant is sued personally for acts done in his capacity as a public official - though he no longer retains that capacity at the time of the proceedings - or under powers conferred upon him by a foreign state".[71]

International law grants personal privilege of exterritoriality or exemption from the civil and criminal law of other states, to the Heads of State, diplomats, and certain other categories of individuals including those officials who are acting in their capacity as private persons in another country. It is argued that such immunity continues even if the person is no longer in his office.

---

71. Publications of the League of Nations, Legal, 1927, Vol. 9, American Journal of International Law, (Suppl.), 1928, p. 125.

According to Kelsen, for instance, an individual cannot be made responsible for an Act of State, even after his deposition, abdication or expiration of office, or if he has been captured as a prisoner of war, since he performed the act while he was still in office.[72]

The 'Acts of State' doctrine was also interpreted by some[73] to mean that the Allied courts could not take jurisdiction over crimes committed by the German Government against German citizens, since they were committed in the German sphere of sovereignty.

Although the 'Acts of State' doctrine has been challanged by the Allied Prosecution at Nuremberg as a "relic of the doctrine of the divine right of kings", yet it allows certain exceptions, for instance, in cases of espoinage and war treason.[74] As Schick said: "To be sure, international Law allows exceptions from this general rule which, ... does not apply in cases of espoinage or war treason, even if the letter have the character of Acts of State. But to go dehors by deducting that because of these few exceptions international law has established

---

72. Kelsen, Peace Through Law, op.cit., p. 85.

73. Woetzel, The Nuremberg Trials in International Law, op. cit., p. 75.

74. Ibid., p. 70.

individual criminal responsibility for all acts of state committed in violation of the Law of Nations is, it would appear, a legally untenable, though at times perhaps politically quite convenient proposition".[75] The doctrine of 'Acts of State' is, therefore, convenient and useful in the interests of good international relations to treat the state as alone responsible for the acts of its servants and to refrain from treating the servant as also responsible.[76]

The Question of 'Aggressive War'

The most controversial and disputed issue raised during the Nuremberg Trial was that of the "Aggressive War". Several questions were raised about "aggressive war". For instance, what is the exact definition of aggressive war, or how to distinguish it from other (non-aggressive) wars; is aggressive war illegal; can the individuals be held responsible for aggressive war?

An objection frequently levelled against the Nuremberg Trial was that the act of planning or waging an aggressive war should not have been considered a crime because there was no single authoritative "definition" of

---

75. Schick, F.B., "The Nuremberg Trial and the International Law of the Future", American Journal of International Law, Vol. 41,1947,op.cit., p. 788.

76. Calvocoressi, op. cit., p. 69.

aggressive war.[77] The defence at Nuremberg argued that no practical definition of aggression existed in international law,[78] and that it would, therefore, be impossible to prohibit with legal sanctions an undefined or undefinable act. The defence contention was that the charge of aggressive war should be dismissed because 'no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed', and that 'there can be no punishment of crime without a pre-existing law'. Even Professor Gros, who attended the London Conference of 1945 for France, refused to declare that taking part in waging an aggressive war was a criminal violation of international law.[79]

Article 6(a) of the Nuremberg Charter declared "planning, preparation, initiation or waging of a war of aggression", or "a war in violation of international treaties, agreements or assurances" to be crimes. Such a definition would, it was apprehended, " reach millions of people such

---

77. Taylor, "The Nuremberg War Crimes Trials", op.cit., p. 338.

78. "Aggression" has been defined now by the Special Committee of the U.N. The General Assembly adopted the Report of the Special Committee defining 'Aggression' by consensus on December 14, 1974 (A Resolution 3314); See Chapter IV, for further discussion.

79. Maugham, U.N.O. and War Crimes, op. cit., p. 33.

as the soldiers, sailors and airmen of German armies who had no choice but to obey"[80], and who had no means of knowing whether the war was or was not aggressive, must be unjust.[81] This Article was said to be hurriedly prepared, never considered properly by the framers, and did not purport to be based on the rules of international law.[82] Therefore, very "little attention has been paid to the question of the extent of complicity necessary to bring about individual liability for crimes against peace ... It may be felt that the words 'or waging' in the phrase 'planning, preparation, initiation or waging' of a war of aggression, contained in the definition of crimes against peace in the Charter of the Nuremberg IMT, ... are sufficient to throw a suspicion of guilt upon the most insignificant member of an army which is waging an aggressive war".[83] As has been said earlier that this provision of the Charter fails to distinguish between the real authors of the war, and those who have merely participated in waging it by blindly obeying the national laws of 'conscription', or who have joined a national army under the compelling

---

80. Jackson Report, U.S. Department of State Publication, No. 3080, op. cit., p. 394.

81. Maugham, U.N.O. and War Crimes, op. cit., p. 34.

82. Ibid., pp. 36-37.

83. Brand, G., "The War Crimes Trials and the Laws of War", op. cit., p. 419.

influence of almost universal popular opinion.[84] It has been suggested by some,[85] therefore, that the entire range of crimes prescribed in Article 6 of the Nuremberg Charter, should have been limited to wel-known conventional war crimes.

Another question that proved most troublesome was that how to assess the accused individual's relation to unlawful enterprise in order to identify the real authors of war. What degree of 'knowledge' of the plans or of the aggressive character of the war must he have possessed? What type of 'action' must he have taken? How 'important a position' must he have occupied and 'how influential' in determining national policy must he have been? 'At what stage' of the criminal enterprise must he have become involved? Is it sufficient that he merely 'waged' aggressive war after its inception if he had no share in its planning or initiation?[86]

---

84. Maugham, op. cit., p. 52.

85. Ibid., (Postscript by Lord Hankey), p.121; Compare Calvocoressi, Nuremberg - The Facts, the Law and the Consequences, op. cit., p. 42.

86. Taylor, "The Nuremberg War Crimes Trials", op.cit., p. 340; In the 'High Command Trial', (referred in the first Chapter), no accused could be convicted of Crimes against Peace unless he was in a position to influence State Policy. Same thing happened in The Tokyo Trials. See Brand, "The War Crimes Trials and the Laws of War", op. cit., p. 420.

All these questions were set out more systematically in the Dissenting Opinion of Judge Leon W. Powers in the "Ministries Trial"[87] (Ernest von Weizsaecker et al.) by a U.S. Military Tribunal, who, speaking of criminal liability for crimes against peace, said: "As to each defendant, therefore, we must seek the answer to the following three questions:

"(1) Did he knowingly engage in some activity in support of a plan or purpose to induce his government to initiate a war?

"(2) Did he know that the war to be initiated was to be a war of aggression?

"(3) Was his position and influence, or the consequences of his capacity such that his action could properly be said to have had some influence or effect in bringing about the initiation of the war on the part of his government?

"Only if all of these questions are answered in the affirmative will we be justified in finding a Crime against Peace has been committed".[88]

---

87. Referred to in Chapter I. Also see Maugham, U.N.O. and War Crimes, op. cit., p. 96.

88. Brand, "The War Crimes Trials and the Laws of War", op. cit., p. 420.

It has also been doubted by some, that to wage a war of aggression may be a delict or wrong by the aggressive State, but how can the individuals who merely participated on the side of the aggressor be criminally held responsible and punished under international law? This point concerning individual responsibility shall be dealt with in subsequent Chapters. However, the Defence Counsel at Nuremberg argued: "today it is not as yet valid international law. Neither in the Statute of the League of Nations, world organization against war, nor in the Kellogg-Briand Pact, nor in any other of the treaties which were concluded after 1918 in that first upsurge of attempts to ban aggressive Warfare, has this idea been realized. But above all the practice of the League of Nations has, up to the very recent past, been quite unambiguous in that regard. On several occasions the League had to decide upon the lawfulness or unlawfulness of action by force of one member against another member, but it always condemned such action by force merely as a violation of international law by the State, and never thought of bringing up for trial the statesmen, generals, and industrialists of the State which recurred to force. And when the new organization for world peace was set up ... in San Francisco, no new legal maxim was created under which an international tribunal would inflict punishment upon those who unleashed an unjust war".[89]

---

89. The Trial of the Major War Criminals before The International Military Tribunal, Vol. 1, 1947, op.cit., p.168.

The Pact of Paris and the Defence

Most of the writers and jurists, even the Nuremberg IMT itself placed great reliance on the General Treaty for the Renouncement of War of 1928, more generally known as the Kellogg-Briand Pact, or the Pact of Paris, ratified by sixty-three nations, including Germany, Italy and Japan, to justify illegality of the aggressive war and the individual criminality involved therein.[90] It is, therefore, necessary to examine the Pact in the light of defence.

The Pact of Paris concluded on August 27, 1928, was composed of a Preamble and three Articles which provided that: "Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated;

---

90. See Oppenheim, International Law, Vol.II, 7th Edn., op.cit., pp.181-186; Lord Wright, "War Crimes under International Law", Law Quarterly Review, Vol.62,1946, pp. 40, 51; Glueck, S., The Nuremberg Trial and Aggressive War, New York, 1946; Stimson, "The Nuremberg Trial: Landmark in Law", Foreign Affairs Quarterly, 1947, p. 179 et seq; W.E. Jackson, "Putting the Nuremberg Law to work", Foreign Affairs Quarterly, 1947, p. 550 et seq.; Taylor, "The Nuremberg War Crimes Trials", International Conciliation, No.450,1949; Quincy Wright, "The Law of the Nuremberg Trial", American Journal of International Law, Vol. 41, 1947.

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty,...

"Article 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be which may arise between them, shall never be sought except by pacific means".

Article III relates to ratification of the Treaty.[91]

The effect of the Pact, it has been maintained, was not to abolish, even for its signatories, the institution of war as such.[92] The Pact, for instance, does not prohibit,

---

91. League of Nations Treaty Series, 94, p.67; Also see Oppenheim, International Law, Vol.II, 7th Edn., pp.181-182; Maugham, U.N.O. and War Crimes, pp.64-65; Calvocoressi, Nuremberg - The Facts, the Law and the Consequences, and elt., p. 38.

92. Oppenheim, International Law, Vol.II, op.cit., para 52fh, p. 102.

(a) a war in self-defence, (b) a war for the enforcement of international obligations (i.e. the U.N. Charter) and as a measure of collective action, (c) a war between the Signatories and non-signatories of the Pact, (d) a war against a signatory state which has already broken the Pact by resorting to war, and (e) a war without any declaration of war.[93] Furthermore, those states which were neither members of the League (now, the U.N.) nor signatories to the Pact, could resort to war under the classical jus ad bellum principle. Also, a state could go to war in the national interest for asserting a claim recognized by international law through the decision of an international judicial or arbitral tribunal.[94]

It will be hopelessly inaccurate to say, therefore, that the Pact of Paris abolished war. Before the Pact was finally accepted, the various Signatories[95] made declarations and statements reserving to themselves the right to have recourse to war in self-defence and to decide themselves

---

93. Ibid., pp.182-183; Also Woetzel, The Nuremberg Trials in International Law, op. cit., pp.146-147; Haugham, U.N.O. and War Crimes, op. cit., p. 67.

94. Kelsen, The Law of the United Nations, 1950, cited in Woetzel, op. cit., p. 147.

95. For instance, France, United States and Great Britain, reserved such rights. See Oppenheim, International Law, Vol. II, 7th Edn., para 52g, pp. 186-187, and note 1, p. 187.

whether the circumstances require such action. This led many to think that the Pact was of little value. This, also indicates that the parties to the Pact wanted to create it only a 'Contractual obligation', which permits reservations, and not a 'Law' for the Community of Nations.[96]

Furthermore, the Pact provided no sanctions, express or implied, in case its provisions were violated, except insofar providing in the Preamble that a signatory who violated the Pact forfeited the benefits derived therefrom. On December 7, 1928, Frank B. Kellogg as Secretary of State said before the House Committee for Foreign Relations of the U.S. Senate: "But how there can be a moral obligation for the United States to go to Europe to punish the aggressor or punish the party making war, where there never was such a suggestion made in the negotiation, where nobody agreed to it, and where there is no obligation to do it, is beyond me. I cannot understand it ... As I see it, we have no more obligation to punish somebody for breaking the anti-war treaty than for breaking anyone of the other treaties which we have agreed to".[97]

---

96. Justice Pal, Dissentient Judgment, op.cit.,p. 42.

97. Quoted from Maugham, U.N.O. and War Crimes, op.cit., p. 68; Further, there was no machinery for the enforcement of the Pact, see Woetzel, The Nuremberg Trials in International Law, op.cit., p.149; and Glueck, S., War Criminals, New York, 1944, p.38, who states that the Pact "... too failed to make violation of its terms an international crime punishable either by national courts or some international tribunal;".

Senator Borahas Chairman of the House Committee for Foreign Relations of the U.S. Senate in his speech about the Kellogg-Briand Pact said on January 3, 1929: "... The treaty is not founded upon the theory of force or punitive measures at any place or at any time ... There are no sanctions; the treaty rests in a wholly different philosophy ... In other words, when the treaty is broken the United States is absolutely free. It is just as free to choose its course as if the treaty had never been written".[98]

The Report of the House Committee for Foreign Relations presented to the U.S. Senate on January 15, 1929, in relation to the Pact stated: "The committee further understands that the treaty does not provide sanctions, express or implied. Should any signatory to the treaty or any nation adhering to the treaty, violate the terms of the same, there is no obligation, or commitment, express or implied, upon the part of any of the other signers of the treaty to engage in punitive or coercive measures as against the nation violating the treaty. The effect of the violation of the treaty is to relieve the other signers of the treaty from any obligation under it with the nation thus violating the same".[99]

---

98. Quoted from Maugham, U.N.O. and War Crimes, op.cit., p.68.

99. Ibid., pp. 68-69.

Finch observed that both by the Preamble of the Pact, and Secretary Kellogg's interpretation, "any action which might result from a violation of the Pact was to be directed against the violating government. Personal criminal responsibility was not stipulated nor even impliedly suggested".[100] Henry L. Stimson, a successor to Kellogg as Secretary of State of the United States, also stated that the Pact had no sanctions of force except that of the public opinion. He further said that the Pact renounced war as an illegal thing and 'nations' engaged in it "must be termed violators of the general treaty law", - and should be denounced as "law breakers".[101]

It has been maintained by many writers and also by the IMT at Nuremberg that the Kellogg-Briand Pact does not specifically brand aggressive war as a crime and stipulate individual criminal liability for such an offence.[102] The Pact never mentioned, defined nor explained the terms, "aggression",

---

100. Finch, George A., "The Nuremberg Trial and International Law", American Journal of International Law, Vol. 41, 1947, p. 31.

101. Woetzel, The Nuremberg Trials in International Law, op. cit., p. 153; Also see Maugham, U.N.O. and War Crimes, op. cit., pp.69-70; Stimson meant 'Nations', and not individuals as 'violators'.

102. Trial of The Major War Criminals before the International Military Tribunal, Nuremberg, Vol. XXII, 1948, pp. 463-464; Also see Oppenheim, International Law, 7th Edn., op. cit., pp. 191-192.

"aggressive war", "international crime". The question of individual criminal liability for "planning, preparation, initiation or waging of a war of aggression" reflected by this Pact, therefore, does not arise at all. Moreover, after January 1929, the Pact was flagrantly broken on about ten occasions, and no one suggested that the individual aggressors had become criminals.[103] Article 6 of the IMT Charter, could not, however, derive authority from the Pact of Paris to avoid the ex post facto charge, and the fact that the "Nuremberg proceeding was unprecedented" must be established.[104]

The Plea of 'Military Necessity'

Another objection usually put forth against the Nuremberg trial is the argument of "military necessity". This is similar to the infamous German doctrine of Kriegsraison.[105] Put in a nutshell, it says that the "necessities of war" are to be taken as overriding the laws of war;

---

103. Maugham, U.N.O. and War Crimes, op. cit., p. 71; Also see Oppenheim, International Law, op. cit., 7th Edn., p. 185.

104. See Maugham, op. cit., p. 72.

105. Melzer, Yehuda, Concepts of Just War, A.W.Sijthoff, Leyden, 1975, p. 88; Also see Oppenheim, International Law, 7th Edn., Vol.II, op. cit., p. 231.

a law of war can be knowingly violated, that is, if the violation can be justified by demands of military necessity. Some writers have cited the argument of "military necessity" as a basis for denying individual responsibility for international crimes. The laws of war, it has been maintained, loses their binding force in case of extreme necessity. And such a case was said to arise when violation of the laws of war alone offers either a means of escape from extreme danger or the realisation of the purpose of war, i.e., overpowering of the opponent.[106] Article 23(G) of the Hague Regulations declared that if it is "imperatively demanded by the necessities of war", even general devastation of a locality is permitted during war. For instance, it is lawful in case of a levy en masse on already occupied territory, when self-preservation obliges a belligerent to resort to the most severe measures.[107]

---

106. The doctrine of 'Military Necessity' originated and found recognition in those times when warfare was not regulated by laws of war, but only by usages. However, modern warfare is not only regulated by usages, but to a greater extent by laws i.e. binding customs and international treaties. The English, American, French, Italian and many German writers, therefore, do not acknowledge the doctrine. See Oppenheim, International Law, 7th Edn., Vol. II, op. cit., p. 232.

107. Oppenheim, International Law, 7th Edn., Vol. II, op. cit., p. 415.

Article 6(b) of the Nuremberg Charter contained "devastation not justified by military necessity"; and this was taken into consideration by the IMT in assessing the guilt of Alfred Jodl, the German Chief of the Operations Staff of the OKW during the Second World War. He had ordered the evacuation of all persons and the burning of their houses in certain provinces of Norway, as a result of which thirty thousand houses were stated to have been damaged. His guilt, probably was, that he could not make provisions for the 'unfortunate peaceful population of the devastated tract of territory'.[108] In the High Command Trial, of course, the U.S. Military Tribunal held in 1948, that in the circumstances of the case, measures of general devastation in Russia ordered by the accused may have come within the orbit of military necessity as recognized by Article 23(g) of the Hague Regulations. The Tribunal declared: "Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires

---

108. Ibid., p. 416.

detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge."[109] Similar decision was given by the U.S. Military Tribunal, in 1948, in the case of Wilhelm List and Others, wherein the defendant was charged with the wanton destruction of private and public property in the Norwegian province of Finnmark during the retreat of the army commanded by him.[110]

The corollary principle of 'personal necessity' adapted from municipal law, was considered at some length in some trials heard before the U.S. Military Tribunals at Nuremberg. What 'necessity' implies here is "personal and subjective, and corelates to acts committed by a person under coercion or duress".[111] In the Flick Case, the U.S. Military Tribunal explained the defence of necessity in a citation from an American text, as follows: "Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not

---

109. Ibid., note 3, pp. 416 - 417.

110. Ibid.

111. Greenspan, Morris, The Modern Law of Land Warfare, Berkley and Los Angles, University of California Press, 1959, p. 495.

disproportioned to the evil ... Necessity forcing a man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity forced his will does not go along with the act". The court further conceded that the defence of necessity applies if there is "a clear and present danger".[112] The defence at Nuremberg also argued before the IMT that the Prisoners of War were imprisoned due to necessity.[113] Again Ribbentrop, one of the accused at Nuremberg, suggested that the interpretation of 'aggressive war' should be restricted to the considerations of the practical necessities of diplomacy.[114]

The Question of Knowledge

Another argument raised by the defence at Nuremberg was the question of knowledge or awareness of guilt, which

---

112. Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Washington, 1950, Vol. VI, pp. 1200-1202; For further conditions required for the defence of necessity as decided in The High Command Case see Vol.XI, p. 509.

113. Trial of The Major War Criminals before the International Military Tribunal, Vol. XXII, 1948, p. 79.

114. See Wright, Quincy, "The Law of the Nuremberg Trial", American Journal of International Law, Vol. 41, 1947, note 30(3), p. 45.

is called in law as mens rea. It was argued that the accused were taken by surprise by the proceedings; there having been no prospect, when they committed the acts, that they would be called to account for the consequences. The question arises that in an army of two or three million men how many would be likely to know that the war in which they have been involved was in truth an aggressive war and a war in breach of a treaty, agreement or assurance, or are likely ever to have heard of the Pact of Paris?[115] So, there was an element of surprise and unfairness in bringing them to book.

It is said that no man can be found guilty unless it is proved that he had the knowledge, will, intent, or other mental conditions necessary to commit the particular crime charged. Crime in international law, as in municipal law, consists of two elements: "the performance of an act forbidden by law (which may be a lawful act performed in an unlawful manner) and the presence in the person executing the act of a guilty or culpable condition of mind, which is known in law as mens rea. Both must be present at the same time to secure conviction".[116] Therefore, what constitute a guilty condition of mind will depend on the nature of the particular

---

115. Maugham, U.N.O. and War Crimes, op. cit., pp. 56-57.

116. Greenspan, The Modern Law of Land Warfare, op. cit., pp. 500-501.

offence. For instance, when officials of an occupying power deliberately and without lawful justification kill inhabitants of the occupied territory, that is "murder in violation of the laws of war"; but if in killing those persons the officials intend to destroy them as members of a national, ethnical, racial, or religious group, then the crime is "genocide".[117]

According to the mens rea principle, "obedience to orders should be regarded as a factual detail germane to the offence, just like the time when, and the place where, the offence was committed; just like the weapon by which it was carried out; and just like the myriads of other circumstantial minutiae".[118] However, the IMT dealt with the matter in a strange manner and declared that, "the defendants, or at least some of them must have known of the treaties signed by Germany outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all ... international law .... ".[119] Contrary to this, it has been suggested that the crime which

---

117. Article 46, Hague Regulations, 1907; Articles 27, 32, Fourth Geneva Convention, 1949; And Article II, Genocide Convention, 1948.

118. Dinstein, Yoram, The Defence of Obedience to Superior Orders in International Law, (Leyden, 1965), p. 98, quoted in Melzer, Y., Concepts of Just War, op.cit., pp. 76-77.

119. Quoted from Maugham, U.N.O. and War Crimes, op.cit., p. 56; Also see Chapter IV of this work.

relates to waging of aggressive war should be based on knowledge, which would be a fair test of real guilt.

The Defence Counsel appealed the Tribunal regarding membership of groups and organisations and said that only those should be prosecuted who, having knowledge of the criminal activity of the group or organisation, deliberately joined it, and thus participating personally in the crimes.[120] Furthermore, Goering argued that "without knowledge of the grave crimes which have become known today, the people, loyal, self-sacrificing, and courageous, fought and suffered through the life-and-death struggle which had broken out against their will. The German people are free of guilt".[121]

In this connexion the decision of the U.S. Military Tribunal in the High Command Case is noteworthy. In this case all the accused were charged with planning and waging aggressive wars and most of them had attended some of Hitler's most important conferences. The Tribunal after a six months' trial held that the knowledge of Hitler's aggressive intentions and participation in planning aggressive wars was "not sufficient to make participation even by high ranking military officers in the war criminal....".[122] In

---

120. Trial of The Major War Criminals before the International Military Tribunals, Vol.XXIII, 1948, p. 307.

121. Ibid., p. 368.

122. Quoted from Maugham, U.N.O. and War Crimes, op.cit., p.95.

addition it was necessary to show "that the possessor of such knowledge, after he acquired it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering or by hindering or preventing it".[123] More interesting is the fact that all the defendants were not found guilty on these grounds by the Tribunal. Similarly in the "Ministries" case the U.S. Military Tribunal observed that: "One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive. Any other test of guilt would involve a standard of conduct both impracticable and unjust".[124]

Other Objections to the Trial

During the Nuremberg Trial the concept of "Conspiracy" also created a lot of confusion. It became apparent, not only from the arguments of defence counsel but from the reactions of the Continental members of the Tribunal, that many European jurists view the Anglo-Saxon concept of criminal conspiracy with deep suspicion. After the close of the IMT proceedings, Professor Donnedieu de Vabres, the French member

---

123. Ibid; Also see Law Reports, Vol. IV, pp. 70-71.

124. See Maugham, op. cit., p. 96.

of the Tribunal, delivered a public lecture in which he uttered some very harsh words about conspiracy and made it plain that he, for one, had endeavoured at Nuremberg to confine that doctrine to the narrowest limits.[125] He also voiced misgivings about the broadness and lack of any clear circumscription of the crime of conspiracy which left a great deal to the discretion of the judges to decide whether a deed should be considered an act of conspiracy,[126]

The Defence contention was that "the military leaders in Hitler's state did not even have an opportunity to participate in a political planning or a political conspiracy with the object of waging a war of aggression, and even less to assist in it actively. They constantly uttered warnings, and were finally themselves overcome by the political leadership".[127] And in particular, Ribbentrop, one of the accused at Nuremberg who found fault with the Treaty of Versailles and justified German Foreign Policy said that "a revolution does not become more comprehensive if it is considered from the point of view

---

125. Taylor, T., "The Nuremberg War Crimes Trials", International Conciliation, No. 450, op.cit., p.345.

126. Woetzel, op. cit., note 37, pp. 204-205.

127. Trial of The Major War Criminals before the International Military Tribunals, Vol. XXII, p. 89; The American judges Anderson and Powers, in subsequent Nuremberg proceedings, warned of the dangers of a too-wide interpretation of the concept of conspiracy. See Woetzel, op. cit., p. 214.

of a Conspiracy. One can regard the theory of the conspiracy as one will, but from the point of view of the critical observer it is only a makeshift solution. Anybody who has held a decisive position in the Third Reich knows that it simply represents a historical falsehood, and the author of the Charter of this Tribunal has only proved with his invention from what background he derived his thinking".[128]

The Tokyo IMT, as will be seen subsequently, never considered 'conspiracy' as a separate offence. Even some U.S. Military Tribunals thought that under Law No. 10, they had no jurisdiction to try conspiracy to commit war crimes.[129]

Several other objections were voiced against the Nuremberg trials. It was contended that the defendants could not be held in compliance with the laws of war as set forth in the Hague and Geneva Conventions because several of the belligerents in the Second World War, notably the Soviet Union, were not parties to these conventions.[130] Further, it was

---

128. Trial of The Major War Criminals before the International Military Tribunal, Vol.XXII, op.cit., p. 375. The charge of 'Conspiracy' was thoroughly discussed in the Tokyo Trial. Most of the German authors were opposed to the concept of conspiracy.

129. See Brand, G., "The War Crimes Trials and the Laws of War", op. cit., p. 422.

130. Hague Convention is based on the contention that only parties to the convention are bound by its provisions. See Article 2 of the Hague Convention of 1907. Soviet Union was not a signatory to the Hague Rules. Also see Woetzel, The Nuremberg Trials in International Law, op. cit., p. 187.

contended by the defence that "common planning cannot exist where there is complete dictatorship". It was also questioned that the laws of war are operative only in war time; to what extent do atrocities committed in peace-time constitute offences against international law? A person, it was argued, could not be held responsible for acts committed under duress, physical of psychological. Individuals can not be held responsible for international crimes, and more particularly in view of the tu quoque argument, i.e. when the Allies also committed violations of the principles which the court invoked, but did not prosecute their own nationals. It has been maintained that International Law does not permit States to administer criminal law over any defendant for any act.[131]

The defendants at Nuremberg urged to sustain the "not guilty' pleas. Goering insisted elimination of the ex post facto aggressive war charge, whereas Ribbentrop appealed to restrict its interpretation in view of the practical necessities of diplomacy. Goering thought that the Hague Conventions were not applicable to 'total war'. Hess, and also Goering, maintained that war should be viewed in the light of the existing conditions of international relations, technology and moral opinion in Germany, especially because

---

131. Wright, Q., "The Law of the Nuremberg Trial", op.cit., p. 49.

of the 'inequities' of the Treaty of Versailles; and the natural aspirations of a defeated people to rehabilitate themselves. Other defendants, relying mainly on evidence, did not deny that crimes had taken place but denied their liability by pleading Hitler's orders, unawareness of the crimes at that time, lack of any criminal intent in issuing orders, or lack of participation in any action which was criminal under the terms of the Charter. This view was maintained by Schacht, Von Papen and Fritsche among other defendants.[132]

The abnormal length of the trial has been criticised by many writers. Some have criticised the concept of collective guilt in the case of the indicted organisations as being primitive.[133] Politically the Trial has been characterised as inexpedient because it may make conciliation between victor and vanquished more difficult, because the Trial may make heroes and martyrs of the accused; or because its principles if generally accepted may reduce the unity of the State; increase the difficulties of maintaining domestic order; and deter statesmen from pursuing vigorous foreign policies when necessary in the national interests.[134]

---

132. Ibid., note 20, p. 45.

133. Kelsen, H., "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" International Law Quarterly, Vol.1, No.2, 1947, pp.165-166.

134. Wright, Q., "The Law of the Nuremberg Trial", op.cit., p.46.

The Tokyo Trial - Joint Defence

The defence contention at Tokyo raised almost the same legal points as were raised at Nuremberg. The defence counsel adopted a joint plan of presentation of their case before the International Military Tribunal for the Far East at Tokyo. This was done to avoid repetition of the same evidence on behalf of two or more defendants and at the same time to preserve the individual interests of each defendant. According to this plan, the defence evidences common to most or all the accused was introduced first, and then each defendant in turn presented additional or new evidence relevant to his own particular defence.[135] During the individual presentation, defendants who had expressed disagreement with the joint defence, introduced contradictory evidence.

It was really strange at the Tokyo Trial that much of the defence evidence supported rather than rebutted the prosecution case. It was partly due to the conflicting interests of the defendants which militiated against a unified and integrated presentation, and partly due to the lack of clear understanding between the American defence counsel and their Japanese co-counsel and the defendants.

---

135. Horwitz, Solis, "The Tokyo Trial", International Conciliation, No. 465, 1950, p. 525.

The reason for this was entirely Japanese. The American defence counsel were powerless to cope with this situation; devoting their efforts and abilities to provide the best defence available, they could suggest, reason, and perhaps cajole, but neither could they insist, nor decide. They had to allow the production of irrelevant evidence; they had to accept much that they disapproved. All these made the defence position at Tokyo extremely difficult.[136]

The opening address on the joint portion of the defence, which was delivered on February 24, 1947, for the most part, was an elaboration of two themes. The minor theme denied the existence of the overall-conspiracy and joint action by the defendants in committing crimes against peace. The major theme asserted that all the acts committed by the defendants and the Government of Japan were acts of self-defence against provocative acts of other nations threatening and interfering with Japan's recognized and legitimate rights in Asia and her right of national existence.[137]

Using a modified phase plan the joint presentation was broken down into the General, Manchurian, China, Soviet Union and Pacific divisions. In Part One, the defence elaborated on the prosecution's basic materials with reference

---

136. Ibid., pp. 525-526.

137. Ibid., p. 526.

to the Government of Japan and background events. The defence, however, accepted and corraborated the prosecution version regarding Government operations, but vigorously opposed some of the conclusions drawn from them by the prosecution. The background evidence dealt with earlier treaties, conventions and other diplomatic exchanges between Japan, China, Russia, the United States and Great Britain.[138] These showed that Japan had acquired before 1928 certain lease rights in the Kwantung Peninsula which had been fully recognized and which it was entitled to protect.

In Part Two, the defence attempted to establish the present state of International Law through the pronouncements and actions of other nations. Raising the tu quoque argument, the defence sought to show that other nations, including some of the prosecuting powers, had from 1928 to 1945 committed acts similar to those for which the defendants were being tried and had made pronouncements contrary to the view that aggressive warfare was a crime under international law.[139]

Part Three of the General Division of the joint defence, sought to show that there had been no conspiracy among the

---

138. Ibid., pp. 526-527.

139. The Tribunal rejected this evidence. It ruled that the relations between the Soviet Union and the Baltic States, Poland and Rumania, between Great Britain and Iran, and between the United States and Denmark were collateral and not relevant to the issues of fact before the Tribunal; see ibid., p. 527.

accused. The defence contented that the prosecution evidence itself showed that there had not been sufficient continuity of membership in the several cabinets to justify a conclusion that the defendants had conspired with each other. The defendants, it was claimed, even disagreed among themselves over policy matters, and no contending conspiracy, therefore, existed. Testimony was submitted to contradict, with respect to certain cabinets, the prosecution evidence showing the relationship between the execution of the common plan and the fall of those governments. It is interesting to note that since 1928 till the formation of the Tojo Cabinet on October 18, 1941, eleven different cabinets rose and fell in Japan. The defence argued, however, that many of them fell because of purely domestic reasons, unrelated to any international situation. Unlike Hitler, no one in Japan was in a continuous position of control in these cabinets or in the military during the period of time covered in the indictment. For instance, in three of these cabinets - the Tanaka Cabinet, April 20, 1927 to July 1, 1929; the Hamaguchi Cabinet, July 2, 1929 to April 13, 1931 and the Hayashi Cabinet, February 2, 1937 to June 3, 1937, not one of the accused was even a member nor were any of them Chief of the Army General Staff nor Navy General Staff during those times.[140] To establish this point, the defence

---

140. Pal, Dissentient Judgment, op. cit., p. 365.

relied on a Japanese newspaperman who had made special studies of the rise and fall of Japanese Cabinets based on the official explanations given at the time. According to his direct testimony, these cabinets had fallen for purely domestic reasons.

It was maintained by the defence witness that the phases "Hakko Ichiu", "New Order in East Asia" and "Greater East Asia Co Prosperity Sphere" had been distorted and misconstrued and that they had no malicious or criminal implications involving military aggression. It was contended that "Hakko-Ichiu" for more than two thousand years had meant only "universal brotherhood" and not world domination by Japan. Similarly, the "New Order in East Asia" carried this idea forward for the improvement and development of all the Asiatic peoples so that they might be independent and have their just share in the World's goods. Japan had not imposed the "Greater East Asia Co Prosperity Sphere" but the other Asiatic peoples had entered voluntarily into it to obtain independence, to improve their fortunes and to develop in accordance with their own institution. Regarding the I.R.A.A., the defence contention was that it was not a device to control the people for war purposes. Its avowed function was that of an intermediary between the government and the people in order to give to the people an understanding of government policies and to make known to the government the

people's desires.[141] It was note a political organisation, and it carried on mainly movement of a spiritual kind, to teach the citizens their duties; and it was mainly concerned with domestic movements like the increase of production and regulation of national living.[142]

Part Four sought to show that the economic activities of Japan were not directed toward aggressive war but were necessary for its domestic economy and protection against economic encirclement by the Western powers. The defence argued that: "the blockade affected all types of civilian goods and trade, even food ... It was the act of all powerful and greatly superior economic states against a confessedly dependent island nation whose existence and economics were predicated upon world commercial relations".[143] The defence accepted the prosecution statistics on the growth of the key industries to be correct, but contested the inferences drawn by the prosecution from these materials. The witnesses further maintained that Japan had made no preparations for the Pacific war at any time until a few months prior to December, 1941. They claimed that the 1937 plans for the expansion of wartime industries were based on a peace-time

---

141. Horwitz, "The Tokyo Trial", op.cit., pp. 527-528.

142. Pal, Dissentient Judgment, op. cit., pp. 362-363.

143. Ibid., p. 129.

budget and were inadequate to meet the needs of hostilities in China begun after the plans were formulated.[144]

In Part Five of the General Division, the defence challanged the prosecution evidence regarding the use of schools and propaganda to prepare the Japanese psychologically for war. The defence witness Yoshida, who was officer in charge of School Training from March 1930 to March 1941, said: "In short, this world-wide tendency especially national training, which was being carried out assiduously by the other powers, compared with that of Japan, made the Japanese Government and people awake to the necessity of carrying out this training ... We believed that it would be most simple and effective to adopt military drill as a course of the school in order to foster the spirit of fortitude, and to cultivate the habit of observing discipline and decorum, valuing labour, as well as to develop physical education and thus to elevate the nation's character. The military authorities had not the slightest intention of forcing this military training to be adopted".[145]

Testimony was also offered to show that moving pictures had not been used to prepare the Japanese for war.

---

144. Horwitz, "The Tokyo Trial", op.cit., p. 528.

145. Pal, Dissentient Judgment, op.cit., p. 145.

The defence witness maintained that the Government of Japan was never interested in motion picture as a medium for disseminating information. The military took no advantage of its propaganda value. Very few films had a military background, and none preached militarism or aggression. Films were rigidly censored to eliminate parts morally objectionable or tending to arrouse ill-feeling in foreign countries. Only slight restrictions were imposed on foreign films prior to 1941.

The Question of 'Self-defence'

The remaining divisions of the joint defence at Tokyo were largely devoted to the major contention that all of the alleged criminal acts of the defendants and Japan were committed in self-defence. William Logan, JR., in summing up the defence case invited the Tribunal to hold that this right of self-defence extended to what may be characterized as economic blockade by other powers. He said that the "evolution of man, with his advancement in science, with the ever-increasing interdependence of nations upon each other for their sustenance introduces into the realm of warfare more than the explosion of gun-powder and the resultant killing of the enemy, but other, and, equally formidable, methods of reducing the resistance of an opposing nation and curbing it to the will of another ...

To deprive a nation of those necessary commodities which enable its citizens and subjects to exist is surely a method of warfare not dissimilar to the violent taking of lives through explosives and force because it reduces opposition by delayed action resulting in defeat just as surely as through other means of conventional hostilities. It can even be said to be of a more drastic nature than the blasting of life by physical force, for it aims at the slow depletion of the morale and well-being of the entire civilian population through the medium of slow starvation".[146]

In the General Division the contention of self-defence was only supported by the defence, but systematic treatment of this plea first started in the Manchurian Division. The defence maintained that conditions in China immediately prior to 1931 hostilities threatened the lives and property of Japanese Nationals in Manchuria and Japan's "special rights" in that area; that the Mukden incident was caused by the Chinese; that the Japanese tried to confine their military action but were prevented by the Chinese forces; that the independence movement was spontaneous; and that Japan had not exploited Manchuria. Jiro Minami, one of the accused and also the defence witness believed that the action taken by Japan was justifiable as a measure in self-defence.[147]

---

146. Ibid., p. 120.

147. Ibid., p. 363.

Regarding narcotics, the defence contended that the Opium Law was designed to bring about suppression of the use of drugs as approved in other countries. The Law was vigorously enforced; special hospitals were provided to cure the addicts; number of addicts were sufficiently reduced; smoking entirely disappeared in many cities; opium was sold through licenced shops and addicts were registered; bulk of the revenue from opium were used to suppress the use of drugs and to cure the addicts.[148]

In the China Phase, the defence sought to establish six major propositions: (1) Japan acted only in self-defence in the North China conflicts on and after July 7, 1937; (2) The hostilities were the result of a conspiracy of the Chinese Communists to drag Japan into a war with China; (3) The Central China hostilities were not at all connected with the hostilities in North China, and in this case too Japan had acted only in self-defence; (4) The prosecution evidence of atrocities in China was wrong and exaggerated and those atrocities which occurred were punished severely; (5) Japan neither wanted nor controlled China economically; (6) The Wang Ching-Wei Government and its predecessors all independent Chinese administrations and not Japanese puppets.[149] The defence further offered to establish the

---

148. Horwitz, "The Tokyo Trial", op.cit., p. 529.

149. Ibid., p. 530.

result of Japan's action which, according to the defence, would retrospectantly indicate both necessity and justification for Japan's original action. Logan, the defence spokesman, said that : "It was Japan's policy to try and settle and localize these incidents, and the activities of the (Chinese) Communists, ... prevented the settlement of the incidents and stirred up new ones. ... The facts adduced in this trial definitely establish that the Pacific War was not a war of aggression by Japan".[150]

The defence spent sufficient time and effort to the charges of Japan's aggression against the Soviet Union. It proposed to establish four major contentions. First, the Anti-Comintern Pact of 1936 was not a joint German-Japanese programme for aggression, but was a plan to prevent the spread of communism. Second, the clashes at Lake Khassan and at Nomonhan were not wars of aggression or tests of Japan's strength against the Soviet Union, but were limited "border incidents" or accidents. Third, neither Japan nor the accused ever planned or prepared any aggressive war against the Soviet Union. Fourth, Japan all through maintained in letter and spirit its Neutrality Pact with the Soviet Union.

---

150. Quoted in Pal, Dissentient Judgment, op. cit., pp. 162-163.

Japan and the Western Powers - The Defence View

The last part of the joint defence dealt with various facets of Japan's wars with the western powers. The evidence was organised and presented in seven parts.

Part One contended that there had been no continuity of policy or relationship between Japan, Germany and Italy. To support this point the German and Japanese witnesses attacked the veracity of the official German documents introduced by the prosecution. The defence, by oral and documentary evidences proposed to establish that upon the signing of the German-Soviet Neutrality Pact, Japan broke off negotiations with Germany for a military alliance. Both the Government and the military being irritated by Germany's bad faith made improvement of relations with the United States their basic aim in foreign policy. There had been no real cooperation with Germany and throughout the hostilities Japan and its allies has fought entirely separate wars. Explaining the situation Ambassador Grew said before the Tribunal: "In regard to Japan's Axis relations, the Japanese Government, though refusing consistently to give an undertaking that it [redacted] its alliance membership, actually has shown a readiness to reduce Japan's alliance adherence to a 'dead letter' by its indication of willingness to enter formally into negotiations with the United States"[151].

---

151. Ibid., p. 520.

In Part Two, the defence sought to show that in the years preceding attack on Pearl Harbour, the Western Powers had deliberately and coordinately applied economic and military pressure against Japan until the situation had become so oppressive and accute that Japan was ultimately forced to fight for its very existence. Further, the Western Powers also desired that Japan should strike the first blow. Japan's attack, moreover, was not sudden, unexpected, or treacherous because her relation with America was peaceful.

Part Three dealt with the 1941 negotiations between Japan and United States. The defence, in this section did not dispute the prosecution evidence, but strongly contested the inferences drawn by the prosecution from the evidence. They contended that the Japanese leaders did everything possible to reach an amicable agreement with the United States.

Part Four was mainly the defence of the Naval members among the defendants. It sought to establish that the Japanese Navy by teaching and custom was reluctant to engage in politics. It never raised a spirit of conquest through propaganda, rather instructed naval, ordinary and moral subjects to its personnel. As a result the Navy consistently exercised a restraining influence on Japan's military leaders.

In Part Five, the relations of Japan and France were highlighted. Aggressive intentions against Indo-China by the Government or military was denied. In order to end the China hostilities as quickly as possible, it was necessary to put Japanese forces into Hainan Island and Indo-China; and this was done with the consent and co-operation of the duly constituted French Government. These occupations, moreover, were only temporary expedients to meet military exigencies. Japan intended to withdraw her troops from French Territory, the moment peace would have been concluded with China.

In Part Six the defence contended that the Japanese army over a period of years had not prepared for war against the Western Powers. It was further contended that the increase in size of the Army was needed for the China hostilities and not for war against other powers. Of course, a part of Japan's forces were withdrawn from China, in order to carry out military operations in the South. It was not until after the Imperial Conference of July 2, 1941, that any effort was made to develop an operational plan other than the usual defensive plans which all armies prepare; and it was not until after the Imperial Conference of September 6, 1941, that the Japanese army made intensive preparations for war against the Western Powers.

The defence addressed itself in Part Seven to the charges of conventional war crimes and crimes against humanity. The defence maintained that Japan had complied in every detail with the requirements of the Hague Convention. Although it had not ratified the Geneva Convention because of differences in habits, customs and ideas of military discipline, it had tried to live upto its obligation to apply its provisions mutatis mutandis so far as circumstances permitted. The defence further contended that even if Japan had failed to implement the provisions of the Conventions, its failure was not wilful but was the result of unrestricted Allied bombing and submarine warfare, which destroyed more than 80% of the Japanese merchant marine. During the war Japan's communication and transport systems were so far impaired that it was impossible for the government and the military commanders in the field to maintain contact and control. As a result the people and the prisoners suffered from a lack of proper food and medical care, and the government was powerless to overcome the situation. However, the treatment accorded to the majority of prisoners was fair and in accordance with the international agreement and usage.[152]

---

152. Horwitz, "The Tokyo Trial", op. cit., p. 532.

Individual Defence at Tokyo

After the presentation of the joint defence, each defendant took the witness stand to present his individual defence. Sixteen of the defendants - Araki, Hashimoto, Itagaki, Kaya, Kido, Koiso, Matsui, Minami, Muto, Oka, Oshima, Shimada, Shiratori, Suzuki, Togo and Tojo -refuted the prosecution charges. All the defendants presented other witnesses and documents to support their own testimony. The remaining nine defendants - Dohihara, Hata, Hiranuma, Hirota, Hoshino, Kimura, Kato, Shigemitsu and Umezu - did not take witness stand but introduced evidence through witnesses and documents.[153]

All the defendants at Tokyo raised the same major contention, already raised in the joint defence, that their acts were justified as acts of self-defence. As the war-time Premier, Tojo, expressed it in his testimony: "To us who at that period were weighted with the duty of deciding the fate of our nation, a war of self-existence was our only alternative ... It was a war of self-defence and in no manner a violation of presently acknowledged international

---

153. See ibid., p. 533.

law.[154] The defendants had sincerely believed that Japan's existence as a nation was threatened by the menace of communism and disorder in China, by the Soviet Union and by the united actions of the Western Powers. Under these circumstances, as the duly constituted officials of the Japanese Government and military agencies, the defendants had been charged with providing for the defence of Japan and the promotion of the welfare of the Japanese people. They had always tried to obtain the materials and security necessary for Japan's defence and survival, without resorting to armed conflict. But when all these efforts failed and Japan's national existence was endangered, there had been no alternative but to go to war.

The question of knowledge and criminal intent was also raised by the defendants. They denied the existence of

---

154. The defence took most of the year to establish the argument of self-defence. However, it is questionable whether the Japanese people understood the significance of the trial of learned new legal methods from it. Widespread interest in the trial began only after the defendants started presenting their case. Many persons presumed that the Tribunal definitely would find the accused guilty and could not understand why the Tribunal took so much time for that. Others argued that they were fortunate not to have been in positions of responsibility and that the Leaders of a defeated Japan could expect no better fate than death. See Borton, Hugh, "The Allied Occupation of Japan, 1945-7," Survey of International Affairs, 1939-1946, (The Far East 1942-1946), Royal Institute of International Affairs, Oxford, pp. 408-409.

the requisite criminal intent. First, they maintained that they at no time knew of the illegality of their acts. When their acts were committed, no one had regarded them as either illegal or criminal and they had not been considered as violations of international law. Second, their effort to maintain peace and to obtain amicable solutions of outstanding difficulties negated the existence of any criminal intent.

The defendants were divided on the issue of responsibility. As has been already mentioned, Tojo placed his entire reliance upon the pleas of self-defence and lack of criminal intent. He assumed full responsibility for all acts committed by him and did not minimize the importance of the decisions and acts to which he had been a party. He sincerely believed that those acts were necessary and unavoidable. He had hoped to obtain his ends by peaceful means; when this could not be accomplished he had acted according to his conviction that they must be obtained through war. The other defendants either denied their responsibility or minimized the importance of their roles. The civilian members of the Government pleaded that they had been powerless against the military. Members of the War Ministry and the General Staff maintained that the detention and care of prisoners was a function of the armies in the field, whereas the

Field Commanders claimed that they only followed the orders of the Government and the General Staff.

Although the Charter of the IMTFE expressly denied the validity of superior orders as a defence,[155] these were claimed both by army and diplomatic defendants. Many of them also contended that the prosecution was attempting to hold them liable on a theory of "vicarious responsibility" for acts committed not by them but by their subordinates.

The defence of 'Acts of State' was raised by those who had held the highest offices during that period. They contended that as members of the government of a sovereign nation they were not answerable to any other power, or group of powers, or to an international community for acts committed on behalf of their nation. Furthermore, they contended that they were answerable only to their own sovereign if their acts violated national laws. Unlike Nuremberg, two of the defendants claimed diplomatic immunity. Oshima and Shiratori maintained that as ambassadors they

---

155. Article 6 of the IMTFE Charter reads: "Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

were entitled to diplomatic immunity for all acts committed by them even though they were not charged with crimes against the nations to which they had been accredited but with crimes against other nations and the international community.[156]

The charge of conspiracy was disputed by the defence, and was characterized as a 'fantastic' one. Yamaoka, for the defence made the following pertinent observations: "The alleged conspiracy which the prosecution has attempted to trace and describe is one of the most curious and unbelievable things ever sought to be drawn in a judicial proceeding. Along series of isolated and disconnected events covering a period of at least fourteen years are marshalled together in hodgepodge fashion;...."[157] The judgment of the Tokyo Tribunal on the issue of conspiracy shall be discussed in the subsequent chapter.

The defendants at the earliest possible opportunity expressed their apprehension of injustice in the hands of the Tribunal as constituted. They contended that the Members

---

156. Horwitz, "The Tokyo Trial", op. cit., p. 534. The defence closed its case on January 12, 1948, having spent 187 days in the presentation of its evidence.

157. Pal, Dissentient Judgment, op. cit., p. 179.

of the Tribunal being representatives of the nations which defeated Japan and which are accusers in the action, the accused cannot expect a fair and impartial trial at their hands and consequently the Tribunal as constituted should not proceed with the trial. Another substantial objection relating to the jurisdiction of the Tribunal raised by the defence was that the crimes triable by the Tribunal must be limited to those committed in or in connexion with the war which ended in the surrender on September 2, 1945. It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence.[158] Considering all these points, the French Judge in the Tribunal, M. Henri Bernard expressed the forcible opinion that, "the Charter of the Tribunal itself was not based on any law in existence when the offences took place ...", and also "that so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries".[159]

Furthermore, the defence maintained that war had not been and was not at the time of trial a crime. The concept

---

158. Ibid., p. 9.

159. Quoted in Maugham, U.N.O. and War Crimes, op.cit., p.100.

of war implied the legal right to use force, and all regulatory provisions governing war were meaningless if war was itself illegal. No court in the past had ever tried such a crime and no punishment had ever been provided. Insofar as the Charter attempted to make aggressive war a crime, it was ex post facto legislation and was therefore void. Justice Pal from India in his dissenting judgment said: "no category of war became a crime in international life upto the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory of the international legal philosophers. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life. No war became an illegal thing in the eye of international law as a result of this Pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war a crime. International community itself was not based on a footing which would justify the introduction of the conception of criminality in international life".[160]

---

160. Pal, Dissentient Judgment, op. cit., p. 70.

It has been seen in the preceding paragraphs that several important legal issues were raised by the defence contentions at Nuremberg and Tokyo Trials. It was also contended that individuals cannot be criminally liable for acts which are neither criminal nor illegal. These create confusion regarding the subjectal status of the individual in international law. It is necessary to see, therefore, that how far the Tribunals could resolve those defence pleas in determining the subjectal status of the individuals.

CHAPTER IV

JUDGMENTS AND THEIR IMPACT ON THE SUBJECTAL STATUS OF INDIVIDUAL

Charter and the Tribunal Justified

The IMT at Nuremberg declared that the law of the Charter was decisive, and binding upon the Tribunal. It also stated that the "making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world."[1] By stating this, the Tribunal claimed jurisdiction from the sovereignty of the Allied Powers over Germany. The four Powers had assumed that sovereignty in order to administer the country until they thought it right to recognize an independent German Government. The exercise of powers of legislation and adjudication during that period was permissible under international law, subject to the rules applicable to subjugated territories which confer powers

---

1. Trial of The Major War Criminals before the International Military Tribunal, Nuremberg, 1948, Vol. XXII, p. 461. (Hereafter referred to as Trial of The Major War Criminals).

beyond those of a military occupant. They had, therefore, the power to bring into force the Charter of the IMT as a legislative act for Germany, provided they did not transgress the fundamental principles of justice which are binding on a conqueror.[2]

Furthermore, the Allied Powers claimed sovereign legislative power over Germany as a result of the Declaration of Berlin, of June 5, 1945, in which they "assume supreme authority with respect to Germany including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption, for the purpose stated above, of the said authorities and powers does not effect the annexation of Germany".[3]

According to Quincy Wright, however, this Declaration differed from the usual declaration of annexation because: (1) it was by several states; (2) its purposes were stated; and (3) it was declared not to effect the annexation of Germany. So it established a condominia over Germany and

---

2. Kilmuir, Viscount, Rt. Hon., Nuremberg in Retrospect, (Presidential Address), Published by The Holdsworth Club of the University of Birmingham, 1956, pp. 5-6.

3. Quoted in Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens & Sons Ltd., London, 1960, p. 77.

enabled the Allies to exercise legislative power and not that of a Military Occupant over Germany. Wright was led to this conclusion because he believed that the Nazi Government disappeared with the Unconditional Surrender in May 1945, and on June 5, 1945, the Allied Powers took over the "Supreme Authority". Moreover, in Article 5 of the Moscow Declaration of November 1, 1943, the Allies Powers had also declared that they are acting "in the interest of the United Nations and had right to legislate".[4]

Similarly Kelsen concluded that the German state had ceased to exist and the victorious Powers exercised a condominium over German territory.[5] Therefore, the Allies could have instituted the war crimes proceedings on behalf of Germany over which they exercised supreme authority.[6]

Many writers also have supported the standpoint that there is evidence to conclude that the Allies did not regard

---

4. Wright, Quincy, "The Law of the Nuremberg Trial", American Journal of International Law, Vol.41, 1947, pp.60-51.

5. Kelsen, Hans," The International Legal Status of Germany to be established immediately upon termination of the War", American Journal of International Law, Vol.38,1944, p. 689, et seq., and "The Legal Status of Germany according to the Declaration of Berlin", ibid., Vol.39, 1945, p. 518, et seq.

6. Gross, L., "The Criminality of Aggressive War", American Political Science Review, 1947, p. 224; Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law", International Law Quarterly, 1947, pp. 167-168.

the Hague Rules as applicable for the occupation of Germany, and they felt justified in assuming the "supreme authority" and exercising it with regard to the war crimes trials.[7] Moreover, it has been pointed out that it would have been impossible to apply German Law under the circumstances. German Law contained many conflicting statutes and directives, e.g., the various "Fuhrerbefehle", which did not correspond to judicial standards in civilized countries, and which made individual liability unclear or impossible to determine. The consent of a German Government could also not have been obtained, in the absence of recognized German state machinery.[8]

Under these circumstances, therefore, and by virtue of the power of legislation assumed under belligerent occupation, the IMT rightly observed that the Allies were justified to legislate over Germany.

Furthermore, the IMT made it clear that making the Charter was not the arbitrary act of the Allies. It said: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, ... it is the expression of international law

---

7. Woetzel, op. cit., p. 84.

8. Ibid., p. 84.

existing at the time of its creation; and to that extent is itself a contribution to international law".[9]

This decision of the IMT, as has been seen in the previous chapter, was criticised by many writers. The chief objections were against the "expression of international law" and the "contribution to international law" portions of the judgment. It has been doubted that the representatives of four Allied nations could create international law. Furthermore, it has been contended that the making of the Charter was an innovation on the part of the Allies and not the expression of existing international law.[10]

But it has been discussed in the preceding paragraphs that the special circumstances existing in Germany justified an occupatio sui generis or an exceptional occupation of Germany.[11] Moreover, the assumption of special powers with regard to the holding of the trial also received the endorsement of the international community.

---

9. Trial of The Major War Criminals, op. cit., Vol.XXII, 1948, p. 461.

10. See Maugham, Viscount, U.N.O. and War Crimes, John Murray, London, 1951, p. 18.

11. Such an occupation, it is said, may justify a suspension of the benefits of the Hague and Geneva Conventions. See Woetzel, op. cit., p. 81.

The fact that twenty-three nations, including the four Allied Powers,[12] and representing the quasi-totality of civilized states, subscribed to the London Charter, indicates that the IMT had the sanction of the international community.[13] Furthermore, on December 11, 1946, the United Nations passed a Resolution No. 95(1) which declared that :

"The General Assembly, recognising the obligations laid upon it by Article 13 ... Taking note of the Law of the Charter of the Nuremberg Tribunal of August 8, 1945, for the prosecution and punishment of the major war criminals: (1) reaffirms the principles of international law recognosed by the Charter of the Nuremberg Tribunal (of August 8,1945), and the Judgments of the Tribunal; (2) Directs the Assembly Committee on the Codification of International Law created by the Assembly's resolution of ... to treat as a matter of primary importance the formulation of the principles of the Charter of the Nuremberg Tribunal and of the Tribunal's judgment in the context of a general codification of offences against the peace and security of manking or in an

---

12. Those 23 nations included all members (except China and Canada) of the United Nations War Crimes Commission established in October 1943. See Chapter I.

13. Schwelb, E., "Crimes against Humanity", British Yearbook of International Law, 1946, Vol. XXIII, pp. 208-209.

International Criminal Code".[14]

It is clear, therefore, that the action of the four major Allied Powers gained the approval of the international community to create the Tribunal; to define the law it was to administer; to make regulations for the proper conduct of the Trial, and to take jurisdiction over the German war leaders. "In doing so", reads the Judgment of the IMT, "they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law".[15]

As such, International Law requires that any state or group of states in exercising criminal jurisdiction over aliens shall not "deny justice".[16] Very few critics, of course,

---

14. Quoted from Woetzel, op.cit., p.15; see Wright, Q., "The Law of the Nuremberg Trial", op.cit., p.51: "Since the Charter of the United Nations assumed that that organization could declare principles binding on non-members, it may be that the United Nations in making the agreement for the Nuremberg Tribunal intended to act for the community of nations as a whole, thus making universal international law".

15. Trial of The Major War Criminals, op.cit., Vol.XXII, p.461.

16. Wright, Q., "The Law of the Nuremberg Trial", op.cit., pp. 51-52.

have suggested any unfairness in the procedure of the trial at Nuremberg. The Tribunal, however, in its "skilful development of a procedure satisfying every traditional and material safeguard of the varying legal forms of the prosecuting nations, it represents a signal success in the field of international negotiation, and in its rigid fidelity to the fundamental principles of fair play it has insured the lasting value of its work".[17]

The defence contention at Tokyo was, however, that there can be no legal, fair or impartial trial, because the judges were from the victorious nations only. The majority judgment of the Tokyo IMTFE, of course, said nothing about this, but the general holdings made it clear that the majority members did not deem the presence of judges from neutral nations, a prerequisite to a fair trial. Moreover, certain judges formally expressed their views on the subject. The President of the Tribunal believed that under international law belligerents have the right to punish, during a war, the war criminals that fall into their hands and may require a defeated state to hand over persons accused of war crimes.[18]

---

17. Stimson, Henry L., "The Nuremberg Trial: Landmark in Law", Foreign Affairs, Vol.25,No.2, January 1947,p.186.

18. Opinion of Sir William Flood Webb, President of the IMTFE, Tokyo, quoted from Horwitz, Solis, "The Tokyo Trial", International Conciliation, No. 465, November 1950, p. 543.

Justice Jaranilla of the IMTFE maintained that what each nation could do for itself, all interested nations could do in concert. For him the fairness and impartiality of the Tribunal was attested by the fact that the Tribunal had absolved the defendants of various charges; that its members had differed on certain issues; and that at least one member, who had voted to acquit all the defendants, had also voted to overrule the challenge to the Tribunal's impartiality.[19]

Justice Pal pointed out that while the judges came from the different victor nations, they were there in their individual capacities. According to him one of the essential factors usually considered in selecting the Judges was moral integrity, which embraced more than ordinary fidelity and honesty. This, he said, included "a measure of freedom from prepossessions, a readiness to face the consequences of views

---

19. Horwitz, op.cit., p. 543, and p.541: Counsel for the defence made trips to China, Germany, the U.S. and Britain to obtain necessary evidence and the expenses of the trips, as well as the remuneration of American defence counsel, was borne by the United States". Documents etc. were made available to the defence. This was also allowed to the defendants at Nuremberg. They could produce and examine any witness. See in this sense, Stimson, "The Nuremberg Trial: Landmark in Law", op.cit., p. 186: "Each defendant was allowed to testify for himself, a right denied by Continental Law. At the conclusion of the trial, each defendantwas allowed to address the Tribunal, at great length, a right denied by Anglo-American Law. The difference between Continental and Anglo-American Law was thus adjusted by allowing to the defendant his rights under both ... In the summation of the trial the defence had twenty days and the prosecution 3, and the defence case, as a whole occupied considerably more time than the prosecution".

which may not be shared, a devotion to judicial processes, and a willigness to make the sacrifices which the performance of judicial duties may involve".[20] Justice Pal, however, felt that the members of the Tokyo Tribunal possessed all these qualities.

Justice Bernard's concurrence was expressed as follows: "A universal authority would be one competent to create tribunals to judge individuals accused of crimes against universal order. But for want of an organism endowed with such universal authority, he who possessed of actual power and moral authority sufficient to assure that duty can set up the necessary tribunals for the trial of persons suspected of acts supposed to be in criminal infringement of natural and international law.

Sufficient proof of goodwill was established when the defendants, who could have been punished without trial, had been turned over to a Tribunal free to acquit them".[21]

In this sense, neither the Nuremberg, nor the Tokyo Tribunal were instruments of vengeance. This was, as Mr. Justice Jackson said in opening the case for the

---

20. Justice Pal, R.B., International Military Tribunal for The Far East, Dissentient Judgment of Justice R.B.Pal, Sanyal and Co.,Calcutta, 1953, pp.6-7 (Hereafter referred to as Pal, Dissentient Judgment).

21. Horwitz, op. cit., pp. 543 - 544.

prosecution at Nuremberg that, "four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason".[22]

Following the Nuremberg precedent, the IMTFE at Tokyo maintained that its Charter was not an arbitrary exercise of power, but the expression of existing international law.[23] The prosecution at Tokyo, in its final summation of the case submitted that "the Charter is conclusive as to the composition and jurisdiction of the Tribunal and as to all matters of evidence and procedure ... that the Charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards and indeed before".[24]

The questions that can be asked are that what is the basis of jurisdiction of such tribunals? Do such tribunals have jurisdiction over aliens abroad?

It is true that there are limits to the criminal jurisdiction of a state. International law does not permit

---

22. Quoted in Kilmuir, Nuremberg in Retrospect, op.cit., p. 18; Also see Stimson, "The Nuremberg Trial: Landmark in Law", op. cit., p. 180.

23. Judgment of the International Military Tribunal for the Far East, November 4-12, 1948, pp. 25-26.

24. Pal, Dissentient Judgment, op. cit., p. 12.

states to administer criminal law over any alien for any act. On the other hand, it is not seriously disputed that every state has authority to set up special courts to try any person within its custody for war crimes, at least if such offences threaten its security.[25] If each of the signatory Powers to the Charter had the right to take such action, it appears indisputable that they could combine and agree to set up a four-nation court to exercise the jurisdiction jointly. The territoriality principle of jurisdiction, based on the lex loci rule, which is very often referred to in this connexion, has been breached in many cases by various other principles and practices of the nations

The case of the S.S. Lotus is cited by many writers to justify the criminal jurisdiction of a state to any case. This case involved the criminal prosecution of the commander of a French vessel by Turkey for a collision on the high seas which resulted in the death of eight Turkish sailors and passengers. In this case the Permanent Court of International Justice held that a state can extend its criminal jurisdiction to any case whatever, unless a rule or principle of international law forbids. The Court said:

---

25. Wright, Q., "The Law of the Nuremberg Trial", op. cit., p. 49; Kilmuir, Nuremberg in Retrospect, op. cit., pp. 4-5.

"International Law governs relations between independent states ... Restrictions upon independence of states cannot ... be presumed .... Far from laying down a general prohibition to the effect that states may not extend the applications of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases every state remains free to adopt the principles which it regards as best and most suitable".[26]

It is said, therefore, that the four Powers could exercise jurisdiction over the defendants for the crimes defined in the Charter, if the crimes threatened their security, and those acts are crimes under international law.[27] Furthermore,

---

26. Quoted in Woetzel, op. cit., p. 59; Also see Anand, R.P., Studies in International Adjudication, Vikas Publications, Delhi, 1969, p. 157, and p. 209: "the division of the Permanent Court in the Lotus case did point to the unsatisfactory nature of international law concerning extension of national competence to crimes on the high seas and helped in the development of Law in this regard"; And see Glueck, S., War Criminals, New York, 1944, p.81.

27. See Kilmuir, op.cit., p. 5; Also see Woetzel, op.cit., p. 62: "... States have long claimed the right to prosecute acts which threaten their security or harm their nationals; it does not matter where or by whom they were committed".

states have often given authority to military courts, to prize courts and criminal courts, to exercise jurisdiction over many offences against international law committed by aliens abroad. Positive international law, however, does not contain express rules limiting the development of the international criminal law of various nations. Some writers have expressed the opinion that states may justify prosecution of foreign nationals for war crimes committed against members of their forces on the basis of the universal principle of jurisdiction. This viewpoint has also been confirmed in the four Geneva Conventions of August 12,1949, which provide that the signatory Powers are obligated to prosecute individuals for serious violations of the agreements, regardless of their nationality or the place where they committed the acts. It has been further suggested by some writers that the universal principle of jurisdiction can be extended to cover the prosecution of persons for crimes against humanity.[28]

It can be concluded, therefore, that the Allied Powers had a right under international law to promulgate laws for

---

28. Woetzel, op. cit., pp. 66-67; Right of nations to punish acts like piracy, trade in slaves, women, children, narcotics, and pornographic literature, destruction of submarine cables, counterfeiting of stamps, currency, or passports, has been generally recognized. See Chapter I.

the captured territories, to institute war crimes proceedings at Nuremberg and Tokyo, and to take jurisdiction over aliens abroad. It has been said that, "World society, acting through the Allied Powers, had the right to mete out justice to all war criminals..."[29]

Aggressive War - A Crime

The International Military Tribunal at Nuremberg declared that it considered aggressive war a crime according to international law. It observed: "that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confirmed to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[30]

The court placed reliance upon the Kellogg-Briand Pact, or the Pact of Paris of 1928,[31] and explained that after the conclusion of this Pact it was illegal for any nation

---

29. Keenan, J.B. and Brown, B.F., Crimes against International Law, Washington, 1950, p. 18.

30. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 427.

31. Ibid., pp.462-463; For the text of the Pact of Paris of 1928, See Chapter III.

to resort to war as an instrument of national policy. The court further interpreted that such a war would be, undoubtedly, aggressive in character, and the ban in the Pact against recourse to war as an instrument of policy applied to aggressive war.

In the words of the Tribunal: "The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact".[32]

The Tribunal, however, in this regard relied on the views of Henry L. Stimson,[33] the then Secretary of State of the

---

32. Ibid., Vol.XXII, p. 463.

33. Opinions of H.L. Stimson are quoted in Chapter III.

United States, who said in 1932 that war has been renounced by the signatories of the Kellogg-Briand Pact, and throughout the world, practically, it has become an illegal thing. Nations engaged in armed conflict after the signing of the Pact, according to Stimson, should be termed as violators of the general treaty law and should be denounced as lawbreakers.

Furthermore, the court declared that although the Pact does not specifically brand aggressive war as a crime and mentions individual criminal liability for such an offence, this, however, can not be an argument against the prosecution of individual violators of the Pact. The court drew analogy from the Hague Conventions of 1907 which prohibited resort to certain methods of waging war.[34] Many of these prohibitions had been enforced long before the date of the Conventions; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Conventions nowhere designates such practices as criminal, nor any sentences prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military

---

34. These prohibitions included the inhumane treatment of Prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. See Trial of The Major War Criminals, op.cit., Vol. XXII, p. 463.

tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by the Hague Conventions. In the opinion of the Tribunal:

"those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact (of Paris), it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing".[35]

The Tokyo IMTFE followed the Nuremberg precedent and observed that whether aggressive war was a crime depended on the legal effect of the Pact of Paris. The renunciation of war in that Pact necessarily involved the proposition that war as an instrument of national policy was illegal and that

---

35. Trial of The Major War Criminals, op.cit., Vol.XXII, pp. 463-464.

those who planned and waged it were committing a crime in so doing. Of course, all the judges at Tokyo were not content to rest their conclusions upon the legal effect of the Pact of Paris. The President, while accepting the majority view of the Pact, assigned as a separate reason the emergence of a customary international law. He also seemed to find a basis for his conclusion in natural law. In his view international law might be supplemented by rules of justice and general principles of law. Rigid positivism was no longer in accordance with international law.[36]

Justice Bernard rejected the Pact of Paris to be the legal basis for his argument, preferring to rest his concurrence squarely on concepts of natural law. He said, "There is no doubt in my mind that such a war is and always has been a crime in the eyes of reason and universal conscience - expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it".[37]

On this question, the opinion expressed by Justice Roling was most interesting and unique. He could not find the legal basis for the criminality of aggressive war either

---

36. Horwitz, "The Tokyo Trial", op.cit., p. 546.

37. Dissenting Judgment, International Military Tribunal for the Far East, November 12, 1948, p. 10. For an exhaustive discussion on Dissenting opinions in international Adjudication see Anand, Studies in International Adjudication, op.cit., Chapter 7, pp. 191-216.

in the Pact of Paris or in customary international law. He believed that crimes against peace were not regarded as true crimes before the London Agreement. Notwithstanding this, there was ample basis in international law for trying the defendants for crimes against peace. He observed:

"Positive international law, as existing at this moment, compels us to interpret the 'crime against peace' as mentioned in the Charter, in a special way. It may be presupposed that the Allied Nations did not intend to create rules in violation of international law. This indicates that the Charter should be interpreted so that it is in accordance with international law.

"There is no doubt that powers victorious in a "bellum justum", and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons.

"Mere political action, based on the responsibility of power, could have achieved this aim. That the judicial way is chosen to select those who were in fact the planners, instigators and wagers of Japanese aggression is a novelty which can not be regarded as a violation of international law

in that it affords the vanquished more guarantees than mere political action could do.

"Crime in international law is applied to concepts with different meanings. Apart from those indicated above, it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain, and where the punishment emphasizes the political measure rather than judicial retribution.

"In this sense should be understood the "crime against peace" referred to in the Charter. In this sense the crime against peace, as formulated in the Charter, is in accordance with international law".[38]

Justice Pal took altogether a different view in this regard. He rejected all the theories advanced to support the thesis that aggressive war was a crime. He concluded in his judgment that no category of war became a crime in international life, till the commencement of the Second World War. Distinctions between just and unjust war remained only in theory of the international legal philosophers. The Pact of Paris never affected the character of war. The Pact, failed to introduce any criminal responsibility for any kind of war in international life. It could not make war an illegal thing

---

38. Judgment of the Honorable Bernard V.A. Roling (Netherlands) of the IMTFE, November 12, 1948, pp. 45-48.

in international law. War itself, he said, as before remained outside the province of law, its conduct only having been brought under legal regulations. And no customary law developed so as to make any war a crime. He further said that international community itself was not based on a footing which would justify the introduction of the conception of criminality in international life.[39] He was not sure that aggressive war had become a crime even through the London Agreement. In any event, he said, no principle of justice would entitle one to invoke the use of any such ex post facto developments in condemning long past acts.[40]

As far as the argument of self-defence was concerned, the Nuremberg IMT refuted the contention that the reservations to the Pact made by several nations with regard to their right of self-defence indicated that each country alone was the sole and conclusive judge of whether a case of self-defence existed which necessitated military action. The court held that "It must be remembered that preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation." It, thus, specifically endorsed the doctrine in the case of Caroline or the

---

39. Pal, Dissentient Judgment, op. cit., p. 70.

40. Horwitz, "The Tokyo Trial", op.cit., p. 548.

The People v. McLeod, referred to earlier.[41] Regarding the test of self-defence the court stated, however, that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced". The court, therefore, concluded that: "In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggression".[42]

The Tokyo IMTFE took almost a similar view on the question of self-defence. Turning to the wars against the Western Powers, the Tribunal categorically rejected the defence contention that these wars had been fought in self-defence. It held: "It remains to consider the contention advanced on behalf of the defendants that Japan's acts of aggression against France, her attack against the Netherlands, and her

---

41. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 448; in the Caroline case the British Government had claimed that McLeod's attack on the Caroline was a legitimate act of self-defence. See Moore, J.B., A Digest of International Law, Vol.II, p. 412; And see Chapter III of this work; also of interest in this connexion the discussion of self-defence in the U.N. Charter, Article 51, and the decision of the International Court of Justice in the Corfu Channel case, See Anand, op. cit., pp. 277-278.

42. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 460.

attacks on Great Britain and the United States of America were justifiable measures to restrict the economy of Japan that she had no way of preserving the welfare and prosperity of her nationals but to go to war.

"The measures which were taken by these Powers to restrict Japanese trade were taken in an entirely justifiable attempt to induce Japan to depart from a course of aggression on which she had long been embarked and upon which she had determined to continue ... The evidence clearly establishes contrary to the contention of the defence that the acts of aggression against France, and the attacks on Britain, the United States of America and the Netherlands were prompted by the desire to deprive China of any aid in the struggle she was waging against Japan's aggression and to secure for Japan the possessions of her neighbours in the South".[43]

The Problem of Defining 'Aggression'

The IMT at Nuremberg did not define "Aggression" or "Aggressive war" in its Judgment. But it was contended that it would be impossible to prohibit with legal sanctions an

---

43. Judgment of the International Military Tribunal for the Far East, November 4-12, 1948, op.cit., pp.990-992; for an excellent discussion on the right of self-defence under the U.N. Charter, see Jessup, Philip C., A Modern Law of Nations, The Macmillan Company, New York, 1950, pp.163-169.

undefined or undefinable act. However, by distinguishing aggressive actions and aggressive wars, the court provided a practical standard of evolution. The IMT declared that the Austrian "Anschluss" and the imposition of German administration upon parts of Czechoslovakia constituted aggressive actions, and could be regarded as steps in a plan to wage aggressive war against other nations. The individuals responsible for these actions were guilty of the crime against peace only in so far as they planned them as phases in a conspiracy to launch aggressive wars against other countries.[44] The wars against Poland, Denmark, Norway, Holland, Belgium, Luxembourg, Yugoslavia, Greece, the Soviet Union, and the United States, were declared by the IMT as aggressive wars. It left open the question whether the conflicts with France and Great Britain were aggressive wars.

The majority judgment of the Tokyo IMTFE did not regard the lack of a comprehensive definition of a war of aggression

---

44. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 573; The U.S. Military Tribunal, in the Ministries Case said, however, that the invasion of Austria was aggressive and a crime against peace, and it branded Germany's action in Czechoslovakia as aggressive invasion. "Invasions" were, of course, included under the concept of crimes against peace, according to Control Council Law No. 10, and not in the Charter of the IMT. See U.S. v. Von Weizsaecker, No. 11, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XIV, pp. 331 and 336.

as militiating against its holding that a war of aggresion was a crime. It was clear that insofar as Japan's actions were concerned, they "were unprovoked attacks, prompted by the desire to seize the possessions of those nations. Whatever may be the difficulty of stating a comprehensive definition of a "war of aggression", attacks made with the above motive cannot but be characterized as wars of aggression".[45]

Justice Roling, who concurred in this view, maintained that it was not necessary in these first trials to draw a sharp line between aggression and defence. The wars of conquest and of illegal expansion which the Tribunal had to consider certainly came within the scope of illegal aggression, whatever definition might be given. It was unnecessary to consider whether the impulses which led to these wars of conquest did, perhaps, originate partly in the defensive sphere.[46]

Justice Pal, on the other hand, regarded the views of the other judges as much too simple. He said that if "aggression" remains undefined, it will be chameleonic, and it may be easy for every nation to determine for others what is aggression. No term is more elastic or more susceptible of interested interpretation, whether by individuals, or by groups, than aggression. Therefore, he said that the duty of

---

45. Cited in Horwitz, "The Tokyo Trial", op.cit., p. 549.

46. Ibid.

definition in such a case is obvious; it would not only make the matter clear but would also give it its true place in the scheme of knowledge showing its origin and connexion with other cognate facts and determining its essentials. Moreover, he said that one of the most essential attributes of law is its predicability. So, to leave the aggressive character of war to be determined according to "the popular sense" or "the general moral sense" of the humanity is to rob the law of its predicability.[47] He pointed out the difficulties that had surrounded the numerous attempts to formulate a satisfactory definition of aggressive warfare. Even if he accepted the definition that a war without justification was a war of aggression, numerous important problems would have to be resolved.[48]

---

47. Pal, Dissentient Judgment, op.cit., p. 112.

48. Horwitz, "The Tokyo Trial", op.cit., pp. 549-550: Justice Pal wanted the following problems to be resolved before accepting any definition of aggression: Were not the embargoes imposed by the United States, which deprived Japan of commodities necessary to its existence, a method of war not dissimilar to armed conflict? To what extent was intervention in the affairs of another power justified to combat the spread of Communism? Did the defence of self-defence include maintenance of a nation's position in the system of power politics prevailing in international life? How far did a neutral have the right to make hostile comment upon the actions of belligerents, particularly in view of the tremendous improvement in communications? What bearing did a boycott or economic sanction by neutral states have upon the aggressive character of the actions of a belligerent state? Was it fair to punish the Japanese when the interests of the so-called Western Powers in the Eastern Hemisphere were mainly founded on the past success in "transmutting" military violence into commercial profit?" In his opinion all these questions were relevant and all must be answered favourably to the Japanese Leaders.

The IMTFE, however, concluded that the evidence had established that Japan had waged aggressive wars against China, the British Commonwealth of Nations, France, the Netherlands, the U.S.S.R., and the United States. It also concluded that a conspiracy to wage wars of aggression for the purpose of domination of East Asia, the western and south western Pacific Ocean and the Indian Ocean, and certain of the islands in those oceans as charged in Count I of the Indictment had been established.[49]

It is said that the lack of a definition does not detract from the legal basis of the delict to any important degree, yet the Nuremberg IMT cited various treaties and agreements, as evidence in support of the contention that

---

49. Judgment of the IMTFE, op. cit., pp. 1138-1143. More than 1,000 pages of the Judgment were devoted to findings on issues of fact. This portion of the Judgment was divided into five parts. The first part dealt with the military domination of Japan and preparation for war. The second, third and fourth parts dealt respectively with Japanese aggression against China and the U.S.S.R., and the Pacific War. The atrocities were covered in the fifth part. Throughout its findings the Tribunal accepted both the evidence and the theory advanced by the prosecution. It found much of the defence evidence unaccountable. The Tribunal could not accept the prolix equivocations and evasions with which defence witnesses had attempted to explain the inferences which normally arise from the occurence of events. See Horwitz, "The Tokyo Trial", op. cit., p. 557.

aggressive war was a crime under international law.[50] The Tribunal declared that all these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal.[51]

'Aggression' - Defined by the United Nations

The literature on the history of the definition of aggression is vast. The debates about the possibility and desirability of defining aggression, and the tortuous path of legal labours of some three decades were culminated in

---

50. The IMT cited in addition to the Pact of Paris of 1928, the draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923, Article1 of which declared "that aggressive war is an international crime"; the "Geneva Protocol" of 1924, declared that aggressive war is an international crime; A declaration adopted in a meeting of the League Assembly on September 24, 1927, branded aggressive war as international crime; on February 18, 1928, 21 American Republics at the Sixth (Havana) Pan American Conference, declared that "war of aggression constitutes an international crime against the human species". See Trial of the Major War Criminals, op. cit., Vol. XXII, pp. 464-465.

51. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 465.

a draft definition of aggression recommended by the Special Committee and was adopted by consensus on December 14, 1974, in the General Assembly (Resolution 3314) of the United Nations. In its Report, the Special Committee on the Question of Defining Aggression recommended to the General Assembly to adopt the following draft definition:[52]

"The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,....

---

52. Report of the Special Committee on the Question of Defining Aggression, 11 March - 12 April 1974, General Assembly official records: Twenty-ninth session, supplement No. 19 (A/9619), United Nations, pp. 10-13. Several attempts were made by states to define aggressions through treaties and conventions, such as the Conventions between Russia and several other states of July 3, 1933; the Draft Convention submitted by the Committee on Security Questions to the Disarmament Conference in May, 1933 etc.. See Oppenheim, L., International Law, Vol. II, Seventh Edition (Edited by H. Lauterpacht), notes 1 and 2, pp.189-190, and the literature cited therein; Also see Thomas and Thomas, The Concept of Aggression, Dallas, 1972; Stone, Julius, Aggression and World Order - A Critique of United Nations Theories on Aggression, London, 1958, pp.151-169; Ferencz, Benjamin, B., "Defining Aggression: Where it Stands and Where it's Going", American Journal of International Law, 1972; And Compare McDougal, M. and F. Feliciano, Law and Minimum World Public Order, New Haven, 1961, pp.120-260; See also Nelser, Yehuda, Concepts of Just War, A.W. Sijthoff, Leyden, 1975.

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage, ...

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim, ...

Adopts the following definition of aggression:[53]

---

53. Explanatory notes on articles 3 and 5 are to be found in the report of the Special Committee (A/9619, para 20). The notes read as follows: I. With reference to article 3, subparagraph (b), the Special Committee agreed that the expression "any weapons" is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon. 2. With reference to the first paragraph of article 5, the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations according to which "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state". 3. With reference to the second paragraph of article 5,

(Contd..p.286)

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Explanatory note: In this definition the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

Contd...p.285
the words "international responsibility" are used without prejudice to the scope of this term. 4. With reference to the third paragraph of article 5, the Committee states that this paragraph should not be construed so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State, which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any

extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

No territorial acquisition or special advantage resulting from aggression are or shall be recognized as lawful.

Article 6

Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this definition, and in particular artlcle 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions".[54]

The Crime of Common Plan or Conspiracy

The IMT at Nuremberg not only upheld the contention that aggressive war was criminal, but also confirmed that the acts of planning, preparing, initiating or waging an aggressive war or participating in a common plan or conspiracy to accomplish any of these ends were illegal and individuals could be held liable for committing them. These crimes were defined in the Charter of the IMT.[55] The Indictment at

---

54. This definition is not without criticism and objection. Even the members of the Special Committee, who worked on the definition, expressed conflicting views, particularly regarding Article 2 of the Definition which could not, it was said, solve the issue of priority vs. intention. See Report of the Special Committee on the Question of Defining Aggression, op.cit., pp. 14-40. Furthermore, it has been said that the definition left vague or ambiguous certain relevant questions concerning intervention; indirect, economic or ideological aggression, national self-determination; governmental or individual criminal responsibility. The definition, moreover, as mentioned in Article 4, failed to enumerate the acts in an exhaustive manner. See Melzer, Concepts of Just War, op. cit., pp. 31-39.

55. See Article 6(a) of the IMT Charter.

Nuremberg charged in Count One the Common Plan or Conspiracy and in Count Two, the planning and waging of war. Same evidence was introduced to support both the Counts. Therefore, the Tribunal decided to discuss both Counts together, as they were in substance the same, but the guilt of the defendants, charged under both Counts, must be determined separately.[56]

The court held that planning and preparation are essential to the making of war. However, it held that "the Planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmation expressed in Mein Kampf in latter years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan".[57]

The "Common Plan or Conspiracy" charged in the Indictment at Nuremberg covered almost 25 years, from the formation of the Nazi Party in 1919 to the end of the War in 1945. The Party was said to be "the instrument of cohesion among the defendants" for carrying out the purposes

---

56. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 467.

57. Ibid., pp. 467-468.

of the conspiracy - the overthrowing of the Treaty of Versailles; acquiring territory lost by Germany in the last war and "Lebensraum" in Europe, by the use, if necessary of armed force; of aggressive war. The "seizure of power" by the Nazis, the use of terror, the destruction of trade union, the attack on Christian teaching and on Churches, the persecution of Jews, the regimentation of Youth - all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it was alleged, in secret rearmament; the withdrawal by Germany from the Disarmament Conference and the League of Nations; Universal Military Service; and seizure of the Rhineland. Finally, according to the Indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936-38, followed by the planning and waging of war against Poland, and, successively, against ten other countries.[58] The Tribunal said: "the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt".[59]

---

58. Ibid., p. 467.

59. Ibid., p. 468.

The Tribunal rejected the argument that common planning can not exist where there is complete dictatorship, to be unsound. It said that a plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. The Tribunal concluded, therefore, that "Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime." [60]

It is interesting and important to consider how the Judgment of the IMT limited the doctrine of conspiracy.[61] The Charter of the IMT did not define as a separate crime

---

60. Ibid., pp. 468-469.

61. Conspiracy is not accepted in Continental Law as having the same width of application as in Anglo-Saxon jurisprudence. See Chapter III of this work; Also see Kilmuir, op.cit., p. 12.

any conspiracy except the one to commit acts of aggressive war. In the opinion of the Tribunal "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action"[62]. Article 6 of the Nuremberg Charter provides "Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan"[63]. These words, the Tribunal said, do not add any new or separate crime to those already listed in Article 6(a),(b), and (c) of the Charter. Rather these words are designed to establish the responsibility of persons participating in a common plan. So the Tribunal decided to disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and to consider only the common plan to prepare, initiate and wage aggressive war.[64] Furthermore, the Tribunal considered that participation in, or knowledge of, the proceedings at the four secret conferences between 1937 and 1939, where Hitler disclosed his plans for aggression, could be sufficient basis to establish the

---

62. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 467.

63. Article 6 of the IMT Charter. Also see ibid., p. 469.

64. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 469.

fact that a person knew of his aims. The Tribunal stressed, however, the necessity that clear intent be shown before a person could be convicted for acts in this category of crimes against peace. Thus, it declared that rearmament as such was not criminal, according to the IMT Charter. In order to be a crime, it must have been carried on as part of a plan to wage aggressive war. An individual could only be held guilty of this crime if he furthered the rearmament effort with this aim.[65] The Tribunal also declared that to be guilty under Count One an individual should have held a sufficiently high position to exert some influence on the aggressive plans. Under Count Two, the court convicted a number of defendants for planning and waging a series of aggressive wars and several others of specific actions in the planning and waging of wars of aggression. In the cases where the guilt involved planning, the action judged to be criminal had a connexion with the inception of an aggressive war, though in some instances less direct than in the conspiracy charge. The court considered various political, military, economic, and administrative activities under these specific crimes, and it did not restrict the charges to a few top officials, as it did in the case of Count One. The IMT convicted the following eight defendants under

---

65. Ibid., p. 554.

count one: Goering, von Ribbentrop, Hess, Rosenberg, Keitel, Raeder, Jodl, and von Neurath. All those eight were also convicted under count two, though Rosenberg, Raeder, and von Neurath were held guilty of specific actions, while the other five were sentenced for having participated in planning and waging a series of aggressive wars. The four defendants convicted under court two alone were: Doenitz, Funk, Frick, and Seyss-Inquart. Hess was the only defendant held guilty of the crime against peace; he was sentenced to life imprisonment, with the Soviet judge, General Nikitchenko, dissenting in favour of the death penalty.

The Tokyo IMTFE did not distinguish between a conspiracy to plan, prepare and wage an aggressive war and its planning and preparing, as did the Nuremberg IMT.[66] The

---

66. This difference between the Nuremberg and Tokyo Judgments were probably due to the fact that the charge in the Nuremberg Charter was "conspiracy to plan, prepare, initiate, and wage aggressive war", whereas in the Tokyo Charter it was only "conspiracy to wage an aggressive war". See Woetzel, op. cit., p. 231; Horwitz, "The Tokyo Trial", op. cit., pp. 552 - 553. Also see Stimson, H.L., "The Nuremberg Trial: Landmark in Law", op. cit., pp. 180 - 181: The Conspiracy charge against the Nazis "is the most realistic of them all, for the Nazi crime is in the end indivisible. Each of the ~~m~~ myriad transgressions was an interlocking part of the whole gigantic barbarity".

majority judgment at Tokyo rejected the defence contention that the conspiracy charges be dismissed on the ground that conspiracy was not a crime under international law; and that if it were, there could be no prosecution because of merger of the conspiracy into the completed substantive offence of waging aggressive war; and finally, conspiracy was a crime in no legal system except the Anglo-American. The Tribunal declared: " no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world and the waging disrupts it".[67]

Furthermore, the IMTFE held that: "A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participated at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfilment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter

---

67. Quoted in Horwitz, "The Tokyo Trial", op.cit., p. 552.

convictions also for planning and preparing. In other words, although we do not question the validity of the charges, we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts six to seventeen inclusive".[68]

The Tribunal, however, found certain defendants guilty of the crime of conspiracy to wage aggressive war and not guilty of having waged aggressive war. It allowed sufficient benefits to the defendants and followed commonly accepted rules of criminal responsibility.[69]

Justice Jaranilla dissented from the majority holding to the extent that it completely identified "Planning and preparing" with conspiracy. Justice Bernard considered

---

68. Judgment of the IMTFE, op. cit., pp. 32-33.

69. Horwitz, "The Tokyo Trial", op.cit., pp. 553-554: The Tokyo Tribunal took different view from the Nuremberg IMT on the principles of responsibility arising from joinder in a conspiracy to the question of guilt for the substantive offence of waging a war of aggression. Modern legal systems generally recognize that persons other than are actually committing the criminal act may be guilty of a crime. They will, therefore, hold guilty of a crime all those who were leaders, organisers, instigators and accomplices in its commission although they did not personally participate in the commission of the criminal act. This general principle had been expressly recognized in the Charter.

"planning and preparing" more serious charges than conspiracy and that the Tribunal should therefore have considered them. The President and Justice Pal held that conspiracy was not a crime under international law. The President said that the Tribunal can not create a law of naked conspiracy; but the leaders, organizers, instigators and accomplices can be held criminally responsible in accordance with a universal rule of criminal responsibility and for committing any substantive crime.[70] Justice Pal's position followed naturally from his conclusion that the substantive offence of aggressive war was not a crime; but he also came to an independent conclusion that conspiracy itself was not yet a crime in international life.[71]

Although giving full effect to the doctrine of conspiracy as applied to aggressive war, the Tribunal, following Nuremberg precedent, dismissed, for want of jurisdiction, all conspiracy counts other than those charging a conspiracy to wage aggressive war. Justice Jaranilla dissented vigorously from this holding, and Justice Bernard dissented from as much of the ruling as dismissed counts charging conspiracies to commit conventional war crimes and crimes against humanity, although agreeing with the ruling to the extent it disallowed the

---

70. Opinion of Sir William Flood Webb, President of the IMTFE, November 1, 1948, Judgment of the IMTFE, op. cit., pp. 8-9.

71. Horwitz, "The Tokyo Trial", op. cit., p. 554.

conspiracies to murder.[72]

Upon the basis of its findings the Tribunal found all defendants except Matsui and Shigemitsu guilty of conspiracy to wage aggressive war, and all except Matsui, Oshima and Shiratori, guilty of having waged aggressive war against China. All defendants except Araki, Hashimoto, Hirota, Matsui, Minami, Oshima and Shiratori were found guilty of waging aggressive war against the United States, the British Commonwealth of Nations and the Netherlands. Shigemitsu and Tojo were alone found guilty of waging aggressive war against France. Dohihara and Itagaki were found guilty of waging war against the Soviet Union at Lake Khassan, and the same persons and Hiranuma were found guilty of waging aggressive war against the Soviet Union at Nomonhan. Dohihara, Itagaki, Kimura, Muto and Tojo were found guilty of ordering, authorising and permitting violations of the laws of war, while Hata, Hirota, Kimura, Koiso,

---

72. Ibid., pp. 554-555. The finding with respect to Count 1 obviated the necessity of dealing with Counts 2 and 3 which charged conspiracies with objects more limited than that proved under Count 1, or with Count 4 which, in the opinion of the Tribunal, charged the same conspiracy as Count 1 but with more specification. Count 5 was construed, contrary to the prosecution's conception of its scope, as charging a conspiracy wider in extent and with even more grandiose object than Count 1. As so construed, the Tribunal was of the opinion that it had not been proved although some of the conspiracies clearly desired its achievement. See Judgment of the IMTFE, op. cit., p. 1143.

Matsui, Muto and Shigemitsu were found guilty of deliberately and recklessly disregarding their legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war.

Justice Pal and Bernard would have acquitted all of the defendants of all charges. Justice Roling would have acquitted the defendants Hata, Hirota, Kido, Shigemitsu and Togo of all charges. He would have convicted Oka, Sato and Shimada, in addition to the charges upon which they were convicted, of the charges of conventional war crimes.[73]

Ex post facto Punishment

The defence counsel at Nuremberg contended that an individual can not be held criminally responsible for an act, unless it had been branded as a crime with a penalty affixed to it in law at the time of its commission. It was based on the maxim nullum crimen sine lege, nulla poena sine lege

---

73. Horwitz, "The Tokyo Trial", op.cit., p. 567, and p.565: "In the same way that planning an aggressive war was subsumed under Conspiracy, the charges of initiation were correlated with the charges of waging aggressive war. Admitting that under certain circumstances initiation of aggressive war might have another meaning, as used in the Indictment it meant commencing hostilities and therefore involved the actual waging of aggressive war. There was therefore no reason to consider the counts of initiation as well as those of waging. Justice Jaranilla, disagreed. In his opinion waging might, but did not necessarily, indude initiation".

praevia, which prohibits ex post facto punishment.[74] Some writers, however, maintain that this maxim is a procedural safeguard against injustice; an accepted moral and ethical principle; an ideal of lawyers and judges, rather than a rule of law, and therefore, may be set aside if considerations of justice so requires. They also maintain that where this maxim has been adopted into a legal system, it is usually with exceptions and qualifications; and in many countries it is not a rule of law at all.[75] On the other hand, some authors have stressed that in the international sphere where there does not exist a central legislature or executive, law develops more like common law than statutory law. Since the body of the law of nations remains largely uncodified, international law grows from case to case, on a customary level and as approved in judicial decisions. So, in such a law, it is said, there will be innovations, cases of first impression, which "necessarily involve the holding criminal of acts not clearly such when done".[76] Furthermore, it has been maintained

---

74. See Chapter III.

75. Woetzel, op.cit., pp. 112-113. Also Kelsen, Peace Through Law, op. cit., p. 87; Schick, "The Nuremberg Trial and the International Law of the Future", American Journal of International Law, Vol. 41, 1947, pp. 770-794; Stone, J., Legal Controls of International Conflict, London, 1954, p. 368.

76. Stone, op. cit., p. 369. Also Trial of The Major War Criminals, op. cit., Vol. XXII, p. 464.

that an act may be punished as a crime if it was "clearly illegal" in character at the time it was committed.[77]

The IMT at Nuremberg observed that "the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.

---

77. Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", International Law Quarterly, 1947, p. 165, In 1921, the German Supreme Court at Leipzig, in the case of the S.S. Llandovery Castle, ruled that an individual may be punished for violations of international law which may not have been defined as crimes, but which were clearly illegal in character. They could be prosecuted under national law as simple cases of murder, arson, theft, etc. See Woetzel, op.cit., p. 114.

On this view of the case alone, it would appear that the maxim has no application to the present facts".[78]

Similarly, the defence contention at Tokyo maintained that war had not been and was not at the time of trial a crime; no court in the past had ever tried such a crime and no punishment had ever been provided. Insofar as the Charter attempted to make aggressive war a crime, it was ex post facto legislation and was therfore void.[79]

In this case also the Tokyo IMTFE followed the Nuremberg precedent and declared that the Charter was not an arbitrary exercise of power but was the expression of international law existing at the time of its creation. The Tribunal interpreted the Pact of Paris to justify the crime of aggressive war.[80]

---

78. Trial of The Major War Criminals, op.cit., Vol.XXII, p.462, The IMT followed its Charter which defined as crime the planning or waging of war, that is, a war of aggression, or a war in violation of international treaties. The Tribulal observed that Germany was a party to the Hague Convention of 1899, which suggested settlement of dispute through good offices or meditation. A similar clause was inserted in the Convention for Pacific Settlement of International Disputes of 1907. The Tribunal also confirmed the Prosecution's contention that Germany had violated various provisions of the Versailles Treaty. Furthermore, in the opinion of the Tribunal, Germany violated the Pact of Paris; also violated the Declaration for the Maintenance of Permanent Peace with Poland (which Germany signed on January 6, 1939), which was explicitly based on the Pact of Paris, and in which the use of force was outlined for a period of 10 years. See ibid., pp. 459-460.

79. Horwitz, "The Tokyo Trial", op.cit., pp. 545-546.

80. Ibid., p. 546.

Inasmuch as the majority had found that aggressive war had been an international crime at the time the acts had been committed, there was no real need for them to consider the ex post facto doctrine. However, they considered the matter, Here again they followed Nuremberg by adopting its language on the point that the principle of nullum crimen sine lege was not a limitation of sovereignty denying power to try ex post facto crimes but a principle of justice. It was not unjust to punish the aggressor; it would be unjust if he were allowed to go unpunished.[81]

Justice Pal disagreed with the majority and, maintained that to brand aggressive war as a crime would be an ex post facto legislation. Justice Roling regarded the maxim as neither a principle of sovereignty nor a principle of justice. He thought that it was a rule of policy, valid only if expressly adopted, to protect citizens against arbitrary courts and legislators. It did not involve the question whether a certain act was criminally wrong at the moment it was committed but only whether the act was or was not forbidden under penalty. As such, the prohibition against such retroactive legislation was an expression of political wisdom not

---

81. Ibid., p. 548. And compare Stimson, "The Nuremberg Trial: Landmark in Law", op.cit., p. 185: "...this is a new judicial process, but it is not ex post facto law. It is the enforcement of a moral judgment which dates back a generation. It is has grown as the common law has grown, for instance, in the case of murder.

necessarily applicable in present international relations. It was not the task nor within the power of the Tribunal to judge the wisdom of any particular policy.[82]

Justice Jaranilla considered the maxim, regardless of its nature, to be inapplicable, although he also subscribed to the majority judgment. He agreed with those writers who held that the ex post facto rule was not applicable to international law. In any event Japan's acts had been strongly protested and warnings had been issued. The Leaders knew that in the case of defeat they would be brought to justice. This position had been made clear by the Allied Powers and Japan and its leaders had accepted their terms.[83]

The Tokyo Tribunal and the Defence Contentions

Another principal contention which the IMTFE at Tokyo had to resolve was that both the Charter and the Indictment violated the provisions of the Potsdam Declaration and the

---

82. Ibid., pp. 548-549.

83. Ibid., p. 549. Also Wright, Q., "The Law of the Nuremberg Trial", op.cit., p. 61: A concrete plan for aggressive war existed much earlier and "the law of war has been held to apply to interventions, invasions, aggressions, and other uses of armed force in foreign territory even when there is no state of war".

Instrument of Surrender. The main argument for this attack was that the surrender of Japan, founded on its acceptance of the Potsdam Declaration, was not unconditional; and that since the Japanese Government and people had agreed only to obey directives in accordance with the Potsdam Declaration, they were not bound to obey if the Supreme Commander or his deputies acted in excess of the authority confirred. Paragraph 10 of the Potsdam Declaration of 20 July, 1945, stated that "stern justice shall be meted out to all war criminals".[84] This, it was argued, meant only "war criminals" committing crimes against the laws and customs of war and not crimes against peace or humanity, which neither the Japanese nor the world at large had considered as crime in July, 1945. Japan accepted the Declaration in view of the commonly accepted understanding of "war crimes". Therefore, when the Charter purported to make crimes against peace and against humanity war crimes, it was void. Moreover, the Potsdam Declaration refers only to Pacific War; the wars against China, the activities against the Soviet Union in 1938 and 1939 and against Thailand did not, therefore, fall within its purview.[85]

The majority judgment over ruled the contention that the Potsdam Declaration does not include crimes against peace

---

84. Pal, Dissentient Judgment, op. cit., p. 13.

85. Horwitz, "The Tokyo Trial", op. cit., p. 544.

and humanity, and this was not contested by the judges of the IMTFE. The Tribunal held: "There is no basis in fact for this argument. It has been established to the satisfaction of the Tribunal that before the signature of the Instrument of Surrender the point in question had been considered by the Japanese Government and the then members of the Government, who advised the acceptance of the terms of the Instrument of Surrender, anticipated that those alleged to be responsible for the war would be put on trial. As early as the 10th of August, 1945, three weeks before the signing of the Instrument of Surrender, the Emperor said to the accused Kido, "I could not bear the sight ... of those responsible for the war being punished ... but I think now is the time to bear the unbearable".[86]

However, this unanimity was not found among the judges regarding the second point that only crimes arising from the Pacific War could be tried and punished. Though not specifically mentioned in the judgment, the fact that certain defendants were found guilty of waging aggressive war against the Soviet Union in 1938 and 1939, implies that this contention was over-ruled. Justice Bernard, however, felt that the events with respect to Soviet Union fell outside the Tribunal's jurisdiction unless it was established that they had formed

---

86. Judgment of the IMTFE, November 4-12, 1948, op.cit., p. 27. Also see Keenan and Brown, op.cit., p. 18.

an integral part of the whole of the facts referred to the Tribunal. Justice Pal concurred in this view, and he would also have excluded the counts from the over-all conspiracy charged. Justice Roling regarded the Potsdam Declaration as limiting the right to try war crimes to crimes connected with the Pacific War. He held the Tribunal to be without authority to try not only the substantive offences committed against the Soviet Union prior to the Japanese - Soviet Neutrality Pact.[87]

Another important contention maintained by the defence at Tokyo was regarding the charge of murder. Corollary to its proposition that aggressive war was not a crime, the defence had maintained that killing in war did not constitute murder. Even those who distinguished between just and unjust wars had never suggested that such killing was murder. On the other hand, the prosecution had maintained that in all modern legal systems any killing was unlawful unless justified. Since aggressive war was an international crime under international law, no killing committed during aggressive war could be justified as legal.[88]

The Tribunal's conclusion regarding this point could neither satisfy the Prosecution nor the Defence. It declined

---

87. Horwitz, "The Tokyo Trial", op. cit., p. 545.

88. Ibid., p. 551.

to pass upon the validity of these novel charges, and declared that "If, in any case, the finding be that the war was not unlawful, then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war in any particular case, is held to have been unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars ...

"For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive".[89]

Justice Jaranilla, although a member of the majority, dissented on this point. He felt not only that the Tribunal should have passed upon the murder charges but that it should

---

89. Judgment of the IMTFE, op.cit., pp. 36-37. The acts which were considered war crimes and crimes against humanity by the IMT Nuremberg, included the murder of prisoners who had escaped and again recaptured, the murder of commandos and captured Allied airman, and the extermination of Soviet political commissars. See Trial of The Major War Criminals, op. cit., Vol.XXII, pp. 471-476.

have sustained their validity. The crime of murder contemplated in the Charter was not the killing ordinarily involved in war but that related to the separate offences of crimes against humanity. The position of the Tribunal nullified the provision of the Charter with respect to the latter crimes. The holding that if the war was lawful, then the charge of murder will necessarily fall was a dangerous pronouncement. The leaders of a nation waging a lawful war, under this doctrine, could with impunity commit, or permit to be committed, murder and other crimes against humanity at will and without any discrimination. A lawful war could not justify the commission of crimes and atrocities.

Justice Pal's conclusion was, however, diametrically opposit from that of Justice Jaranilla. He, for his purpose, divided the charges into two groups: those involving killing arising from attacks on alliedterritory and those involving the slaughter of inhabitants in occupied territories. As to the first group, since war had neither legality nor illegality, killing was not murder. As to the second group, he agreed that they were covered by the more comprehensive counts 54 to 55.[90]

---

90. Horwitz, "The Tokyo Trial", op. cit., pp.551-552.

Throughout the course of the proceedings the prosecution laid particular stress to the initiation and murder counts growing out of the attacks without warning at Pearl Habour and in the British possessions. Sufficient evidence was introduced to show that the Japanese leaders manoeuvered to avoid the requirements of Hague Convention III for previous and explicit warning before opening hostilities. Despite its holdings that the initiation and murder counts need not be separately considered, the Tribunal deemed the matter worthy of a special pronouncement. It held: "Hague Convention III: undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced, but it does not define the period which must be allowed between the giving of this warning and the commencement of hostilities ... This matter of the duration of the period between warning and hostilities is of course vital. If that period is not sufficient to allow of the transmission of the warning to armed forces in outlaying territories and to permit them to put themselves in a state of defence they may be shot down without a chance to defend themselves ...

".... We have thought it right to pronounce the above findings ... mainly in order to draw pointed attention to the defects of the Convention as framed. It permits of a narrow construction and tempts the unprincipled to try to comply with the obligation thus narrowly construed while at the

same time ensuring that their attacks shall come as a surprise. With the margin thus reduced for the purpose of surprise no allowance can be made for error, mishap or negligence leading to delay in the delivery of the warning, and the possibility is high that the prior warning which the Convention makes obligatory will not in fact be given.[91]

Condonation and estoppel had been the grounds of another defence contention. The defence maintained that because the aggrieved parties continued their diplomatic relations with Japan, they could have availed the known methods of redress in accordance with international usage. By failing to resort to measures short of war or, if necessary to war, they had actually condoned and became accessories after the fact to Japanese aggression and were therefore estopped from trying the leaders of Japan. But the Tribunal held: "In a matter of criminal liability whether domestic or international it would be against the public interests for any tribunal to countenance condonation of crime either expressly or by implication."[92]

Furthermore, four of the defendants at Tokyo had a special legal defence. Itagaki, Kimura, Muto and Sato had been army commanders in the field and had surrendered to the

---

91. Judgment of the IMTFE, op. cit., pp. 986-989.

92. Ibid., p. 841.

allied armies. It was claimed, therefore, that they had thereby acquired the status of prisoners of war and were entitled to protections of Article 60 and 63 of the Geneva Convention.[93] In violation of these provisions, the defendants were being tried, without notice having been given to the protecting power, before an international tribunal instead of a courtmartial. However, the court rejected this defence contention and expressly adopted the ruling of the Supreme Court of the United States in the Yamashita case[94] that the provisions of the Geneva Convention applied only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war, and did not deal with any other types of offences.[95]

---

93. Horwitz, "The Tokyo Trial", op.cit., pp. 556-557. Article 60 of the Geneva Convention of July 27, 1929, required that at the commencement of a judicial proceeding against a prisoner of war the detaining power should notify the protecting power of the nation to which he belonged; and Article 63 required that he be tried by the same tribunal and in accordance with the same procedure as of the armed forces of the detaining power.

94. In the case of Yamashita (1946, 327 U.S.7), the U.S. Supreme Court held, after a detailed examination of the origin of Article 60 of the Geneva Convention of 1929, that it did not apply to prisoners of war accused of war crimes and that it referred only to offences alleged to have been committed during captivity. See Oppenheim, International Law, op.cit., Vol.II, 7th Edn., note 3, p. 390; A similar judgment was given in the High Command Trial. See Brand, G., "The War Crimes Trials and the Laws of War", British Yearbook of International Law, Vol.XXVI, 1949, p. 434.

95. Horwitz, "The Tokyo Trial", op.cit., p. 557.

The IMT at Nuremberg observed that the prisoners of war were ill-treated, tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. Those crimes, as defined in Article 6(b) and 6(c) of the IMT Charter, violates the provisions of Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929, for which the guilty individuals were punishable "is too well settled to admit of argument".[96]

Other Findings of the IMTFE

Observing the wide range of atrocities committed by the Japanese during the war, the IMTFE at Tokyo declared: "The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945, torture, murder, rape and other cruelties of the most inhuman and barbarous character were freely practised by the Japanese Army and Navy. During a period of several months the Tribunal heard evidences, orally or by

---

96. Trial of The Major War Criminals, op.cit., Vol.XXII, pp. 470, 471, and 497.

affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale so vast, yet following so common a pattern in the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces".[97]

The Tribunal concluded that count 54, charging the "ordering, authorising and permitting of the commission of atrocities", and count 55, charging "the failure to take adequate steps to secure the observance and prevent breaches of the conventions and the laws of war with respect to prisoners of war and civilian internees", had been established as to certain defendants.[98]

Justice Roling took a somewhat different version of the facts with respect to crimes against peace. He thought that

---

97. Judgment of the IMTFE, op.cit., p. 1001.

98. Horwitz, "The Tokyo Trial", op.cit., p. 561. The IMTFE did not deem it important to consider whether Japan's activities against France in 1940 and 1941 constituted the waging of a war of aggression in view of its finding that such a war was waged in 1945 upon the refusal of the Governor of Indo-China to accept new Japanese demands. It also deemed unimportant the fact that Netherlands had taken the initiative in declaring war on Japan. See Judgment of the IMTFE, op.cit., pp. 994-995. Regarding count 30, which charged waging of aggressive war against the Commonwealth of Philippines, the Tribunal observed that since during the war Philippines was not a completely sovereign state, and for purposes of international relations was part of the United States, therefore, for technical accuracy, it would be considered as part of the waging of aggressive war against the United States. And count 34, which charged the waging of aggressive war against Thailand, was found not to have been proved and was dismissed. Horwitz, ibid., p. 560.

in Japan one group existed which, in peaceful way, was striving for a prosperous Japan which would dominate East Asia;whereas, another group existed, which aimed at Japan's expansion by force; a military clique, eager and determined to solve political and economic problems, by force of arms. Gradually the second group gathered strength. It was necessary, he thought, to determine the relationship between the two different concepts. In order to study this development, he divided the period into three divisions. In the first period between 1928 and 1936, the military clique started threats and assassinations at home, and independent action abroad. This was the period of struggle. The second period, which runs from February 26, 1936, to September 19, 1940, was the period of collaboration between the two groups regarding domination of East Asia, although the opposition continued. The final period started on September 19, 1940, when the use of armed force was gradually accepted as government policy.[99] Justice Roling agreed with the majority regarding the military clique, but regarding the non-militarist group of defendants he would have given the benefit of the doubt during the second period even with respect to China since they always "had to consider that there was a power in their country which was prepared to achieve its ends by murder or revolution".[100]

---

99. Judgment of Honorable B.V.A. Roling of the IMTFE, November 12, 1948, op.cit., pp. 63-64.

100. Ibid., pp. 65, 99.

Justice Pal disagreed with all the findings of the Tribunal. In order to conclude that no conspiracy had been proved he, contrary to the majority, placed great reliance upon the testimony of defence witnesses and questioned the reliability and importance of some of the prosecution witnesses and documents respectively. He also felt it necessary to consider certain materials and factors which the other judges discarded as irrelevant.[101] He held: "Even when several nations form themselves into a group, and adopt a particular policy against any particular ideology prevailing somewhere in the international society, we do not characterize this as a conspiracy".[102] He stressed that it would be immaterial to consider the actions taken by Japan in pursuance to a particular policy; rather the circumstances for the adoption of such policy or action, irrespective of any conspiracy, should be considered. He also thought it unnecessary to consider whether any of the wars against any of the nations covered by the indictment was aggressive. Furthermore, Justice Pal regarded that although the conventional war crimes come within the jurisdiction of the Tribunal, the commission of those crimes had not been established. He could not find any of the accused to be responsible for the commission or omission of any crime

---

101. Ibid., pp. 983-84; Horwitz, "The Tokyo Trial", op.cit., pp. 562-563.

102. Horwitz, ibid., pp. 563-564.

against the civilian population or against the prisoners of war.[103]

Justice Bernard too disagreed with the majority. He believed that certain methods of procedure vitiated the trial. He mentioned three defects of the procedure. The first was that the defendants were not given the opportunity to obtain and assemble elements for the defence collected independently by a magistrate. Secondly, he felt that the trial had violated the principle of oral deliberations in its judgment, and several of the judges took secretarial assistance, which are uncommon to the French legal practice. Thirdly, he wanted that the Emperor should have been indicted by the prosecution, and the absence of the Emperor from the trial was detrimental to the defence of the accused.[104]

---

103. Ibid., p. 564. Moreover, Justice Pal maintained that regarding the commanders in the field two factors should be considered; first, the difference between the Japanese and Western view of surrender, and second, overwhelmingly large number of surrenders by Allied personnel to the Japanese. Also due to disrupted communications proper care of the prisoners was hampered, yet protests were enquired. Under all these circumstances, he held that none of the defendants were guilty of conventional war crimes.

104. Horwitz, "The Tokyo Trial", op.cit., pp. 565-566: This is an excellent example of one of the difficulties of an international trial where national legal systems are insisted as indispensible requisite for a fair trial.

Although, Justice Bernard believed, that the trial was nullified by those defects, he would have found the defendants not guilty of crimes against peace. It was not necessary to the prosecution of a crime to show that the accused had knowledge of the Law, making it a crime; and no judge could condemn an accused "without being certain that he was in a position at the date of the facts considered reproachable to discover the criminal character of them". While everyone was in a position to learn during the period of the Indictment that conspiring, planning, preparing, initiating and waging aggressive war were crimes; it was evident that those terms were too vague to assist a citizen conducting the external relations of his country in forming an opinion on the merit of his conduct.[105]

Crimes and the Judgment at Tokyo

The convictions of all but one of the defendants at Tokyo on one or more charges of crimes against peace inevitably raised the question of the individual accountability of persons who participate in the government of a nation or who are members of one of its agencies. This question was not directly discussed by the IMTFE at Tokyo, but some light was thrown on this matter in the view expressed by Justice Roling.

---

105. Horwitz, "The Tokyo Trial", op.cit., p. 566.

The test of the liability of military personnel for crimes against peace, according to Justice Roling, lies in their relation to the formulation of government policy. He held: "When the Army in a given country assumes a position which makes it the decisive agent in the formulation of the state policy it can consequently wage war. The Army, if it restricts itself to the proper Army function, i.e. to constitute the power which carries out the command of the Government, cannot "wage war". As such, the Army is merely one of the instrument with which war is waged".[106]

The responsibility of each soldier in relation to Crime Against Peace was governed by the same principle. Justice Roling observed: "The soldier who merely executed government policy should be regarded as criminal, as guilty of the crime against peace. The duty of an army is to be loyal. Soldiers nor sailors, generals nor admirals should be charged with the crime of initiating or waging aggressive war, in case they merely performed their military duty of fighting in a war waged by their government.

"In this case, the danger of a situation where military man influence the policy of a country has been made clear for all time. The army should be the power to defend the country, and to execute the policy decided upon by the government. It should not make, or influence, that policy.

---

106. Roling Judgment, op.cit., p. 41.

"If this is correct, it follows that one should not expect military officers to resign when ordered to fight in a war which is of aggressive nature. To demand this would amount to making interference in politics obligatory for the military. It would mean that one demands the very thing which, in a different connexion, is considered to be at the root of the evil.....".

"No soldier should ever be found guilty of the crime of waging an aggressive war simply for the reason that he performed a strictly military function. Aggression is a political concept, and the crime of aggression should be limited to those who take part in the relevant political discussions....."

"Moreover, a soldier who merely performs his military duty can not be said to have waged the war. In view of the meaning of this word, and the purpose to which it is used in the definition of the crime against peace, it should be so understood that only the government, and those authorities who carry out governmental functions and are instrumental in formulating policy, wage the war".[107]

This norm of Justice Roling was applied by the majority except the President, in determining individual liability

---

107. Ibid., pp. 179-181, 188.

for crimes against peace.[108] The President held that aggressive war was criminal had to "be carried to its logical conclusion". Every person, regardless of his status, who took part in an aggressive war was responsible provided he knew or should have known that the war was aggressive.

As to the person who enters a government with the best intention of preventing war but fails after exerting his best efforts and thereafter votes for war, Justice Roling would find him not guilty of crimes against peace. He observed:

"Assuming that these are the facts, the question is whether a crime was committed under mitigating circumstances, or whether no crime was committed at all. Comparison with situation under domestic criminal law would readily suggest the former. (Conclusion. In view of the special nature of the crime against peace, and of the special nature and requirements of international relations, one is inevitably drawn to the latter. To join a cabinet, or, in general, to assume a function with the purpose of promoting opportunities for peace is an international duty if one is especially qualified to do so. If it were to follow from the law that a crime committed by staying on in a war-minded cabinet, than that law would be unrealistic and impractical. It would defeat its purpose,

---

108. Horwitz, "The Tokyo Trial", op.cit., p. 569. Each of the military men found guilty of crime against peace was found to be a formulator of government policy.

namely, the maintenance and promotion of peace. The crime against peace cannot be committed for the sake of peace. In the crime against peace, the decisive element is the intention of aggression. If, as the inevitable result of having occupied a position for the sake of promoting peace, one is forced to vote for war, one can not be accused of aggressive intent)."[109]

It is doubtful whether the Tribunal agreed with this view or not; because in the case of Togo, who had specifically raised this defence, it held: "However, when the negotiations failed and war became inevitable, rather than resign in protest he continued in office and supported the war. To do anything else he said would have been cowardly. However, his later action completely nullifies this plea. In September 1942, he resigned over a dispute in the cabinet as to the treatment of occupied countries. We are disposed to judge his action and sincerity in one case by the same considerations as in the other".[110]

---

109. Roling Judgment, op. cit., p. 245.

110. Quoted from Horwitz, "The Tokyo Trial", op.cit., p. 570, The Tribunal holding against Togo seems to be based on a finding against the sincerity of his efforts to prevent the Pacific War. Despite the specific overruling of his plea, however, he received a lesser sentence than others convicted of the same crime.

The final judgment of the Tribunal was very lengthy, over 1,200 pages of text and 300 pages of appendices. It contained the detailed account of all events and relation of defendants to these events. The Tribunal which had sat on 417 days and had conducted 818 court sessions, had heard oral testimony from 419 witnesses and had received affidavits and depositions from 779 other witnesses. It had received in evidence 4,336 exhibits. The transcript of its record contained 48, 288 pages and the exhibits totalled an additional 30,000 pages. See Horwitz, ibid., p. 542.

With respect to one who joins a government already engaged in an aggressive war, Justice Roling would have his guilt or innocence basing on the intention with which he entered the cabinet.

"If one has entered a war cabinet, such as Tojo or Koiso cabinets, with the intention of promoting peace, and of bringing to a speedy end the war already in progress, one can not be said to have waged that Aggressive war. This war planned and initiated by individuals, but once started it assumed an impersonal existence of its own. However, those individuals who after the outbreak of war are appointed to public functions in the war machine but who actively support the Aggressive policy which prolong the war, such individuals may be guilty of the crime of waging war. But he who assumes public office in order to oppose that war, who accepts his appointment in order to promote peace, can not and should not be accused of waging an aggressive war".[111]

In sharp contrast to their failure to spell out the principles of liability for crimes against peace, the majority elaborated in great detail their views on the principles of liability for conventional war crimes. They held that the responsibility for the care of prisoners of war and civilian internees rests with the government having them in their

---

111. Horwitz, "The Tokyo Trial", op.cit., pp. 570-571.

possession. The members of the government have a principal and continuing responsibility even though they delegate the duty to others. In Japan the duty rested not only upon the members of the government but also the military and naval officers in command of formations having prisoners in their possession, officials in the departments concerned with the well-being of prisoners and officials having direct and immediate control of prisoners. Such persons became liable for ill-treatment of prisoners if they fail to establish a continuous and efficient system for carrying out the duty, or if having established such a system, they failed to secure its continued and efficient working.[112] If they do establish a proper system and secure its efficient functioning, they are not liable for conventional war crimes, unless they have knowledge that such crimes were being committed and fail to take steps within their power to prevent their commission in the future, or are at fault in having failed to acquire such knowledge. That crimes are notorious, numerous and wide-spread as to time and place are factors to be considered in imputing knowledge.

Under these principles a member of a cabinet is not absolute of his responsibility if, having knowledge of the crimes, and omitting or failure to secure measures to prevent

---

112. Ibid., p. 571.

their commission in the future, he elects to remain in the cabinet, even though his department of government is not directly concerned with the care of prisoners. An army or navy commander, who knows or should know that within units of his command conventional war crimes had been committed and who takes no adequate steps to prevent their future occurrence, is responsible for the future crimes. No duty to resign rests upon departmental official, but if they knew or should know and do not attempt to prevent their reoccurrence they too are responsible for future crimes.[113]

Justice Bernard's view was quite different. He divided responsibility into two categories : (1) those guilty of passive complicity for having failed to prevent violations, although able to do so, and (2) those who had failed in their duties toward prisoners and through negligence, imprudence, or voluntary disregard or orders or regulations, had created a situation conducive to the multiplication of violations of the laws of war. In neither case could any legal presumption arise from the position held by the accuser or his state of knowledge. Passive Complicity, he held, should be punished by death; but those, failing in duty, should be punished by

---

113. Ibid., pp. 571-572. Justice Roling held that the majority had gone too far in assuming responsibility of all cabinet members. He preferred to limit the principle to those directly charged with maintaining and caring the prisoners.

imprisonment of a limited duration, and if their guilt was found to be aggravated, then a life sentence could also be given.

The final Judgment of the IMTFE at Tokyo was silent as to the factors considered in determining sentences. Only two of the judges addressed themselves directly to this problem. Justice Roling believed that so long as the dominant principle in the crime against peace is the character of the individual committing the crime, punishment should be determined solely on considerations of security; and that capital punishment should not be given to those found guilty only of crimes against peace. The President, however, pointed out that at Nuremberg, despite the Tribunal's finding that the initiation of a war of aggression was the supreme international crime, no one who was found guilty only of crimes against peace received the death penalty. He further held that the Japanese should be identically treated with their counterparts in Germany; and therefore, no Japanese should be sentenced to death for crimes against peace. These views might be the motivating forces for the Tribunal's action, because the defendants sentenced to death had all been convicted of conventional war crimes.[114]

Concluding its judgment, the Tribunal sentenced Dohihara, Hirota, Itagaki, Kimura, Matsui, Muto and Tojo to

---

114. Horwitz, "The Tokyo Trial", op.cit., p. 573.

death by hanging. All but two of the remaining defendants received a life sentence. A sentence of seven years was imposed on Shigemitsu and one of twenty years on Togo,[115] both the sentences to run from 3 May 1946.[116]

Individual Responsibility and The Judgment

The IMT at Nuremberg had to resolve several important contentions raised by the Defence Counsel. The Tribunal, however, rejected the submissions that there could be no

---

115. Ibid., p. 572. Justice Roling concurred in all the death sentences except that of Hirota and would have also imposed the supreme penalty upon Oka, Sato and Shimada. Justice Jaranilla, without specifying those to which he referred, considered a few of the sentences too lenient, not exemplary and deterrent and not connensurate with the gravity of the offences committed". Also see, for the final Judgment, Survey of International Affairs, 1939-1946, The Far East 1942-1946, Royal Institute of International Affairs, Oxford, p. 409.

116. Horwitz, ibid., p. 573, Immediately upon the pronouncement of the sentences 10 days were granted to the defendants to appeal to the Supreme Commander from their convictions. On 24 November 1948, General MacArthur, after having consulted with the diplomatic representatives in Japan from each of the nations represented on the Far Eastern Commission, confirmed the convictions, and directed the sentences to be executed.

Furthermore, execution of the death sentences was deferred pending a decision of the Supreme Court of the United States. Immediately upon the confirmation of the sentences Hirota, Dohihara, Kido, Oka, Shimada and Togo filed motions for leave to file petitions for writs of habeas corpus in the Supreme Court. After arguments, all motions were dismissed for want of jurisdiction. The last avenue of appeal was closed, and a few days after the Supreme Court had announced its action, the death sentences imposed by the Tribunal were carried out.

individual liability under international law, particularly for the Acts of State. The court held that international law imposes duties and liabilities upon individuals as well as upon states has already been recognised. The court cited the case of ex parte Quirin,[117] in which the late Chief Justice Stone, speaking for the Court said: " ... this court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals". The IMT held that many such authorities could be cited to show that individuals can be punished for violations of international law, and concluded that crimes against international law are committed by men, not by abstract entities, and punishing such individuals only the provisions of international law can be enforced. The court also referred to Article 228 of the Treaty of Versailles which illustrate and enforce the view of individual responsibility.[118]

---

117. In the case of ex parte Quirin (1942-317, US-1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. See Trial of The Major War Criminals, op.cit., Vol. XXII, p.465. This case has been referred earlier in this work.

118. In Article 228 of the Treaty of Versailles the German Government expressly recognised the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the Laws and Customs of War". Trial of The Major War Criminals, op. cit., XXII, pp. 465-466.

The court refuted the argument that the IMT constituted an unprecedented Special Tribunal, by citing Article 227 of the Versailles Treaty, which provided for the constitution of such a tribunal to try the former German Emperor.[119]

As far as the contention of Acts of State is concerned, the Tribunal declared: "The principle of international law which, under certain circumstances, protects the representatives of a State, can not be applied to acts which are condemned as criminal by international law. The authors of these acts can not shelter themselves behind the official position in order to be freed from punishment in appropriate proceedings".[120] Furthermore, the court said: "On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war can not obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law".[121]

In resolving the problem of superior orders, the Tribunal referred to Article 8 of the Charter of the IMT and declared:

---

119. Referred to earlier in this work. Also See Trial of The Major War Criminals, Vol.XXII, op.cit., p. 465.

120. Trial of The Major War Criminals, Vol.XXII, op.cit., p. 466. And Article 7 of the IMT Charter.

121. Trial of The Major War Criminals, Vol.XXII, ibid., p.466.

"The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".[122]

To the contention that several belligerents in the Second World War were not parties to the Hague Convention of 1907, the Tribunal felt that it was unnecessary to decide this question. It said: "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws

---

122. Ibid., p. 466. Also see Kilmuir, Nuremberg in Retrospect, op.cit., p. 17: He gives an example from the British history. At Culloden, after the Highland army was beaten, Wolfe, the subsequent captor of Quebec, but then a battalion commander, was riding beside the Duke of Cumberland. Cumberland ordered him to shoot a wounded Highland officer lying helpless on the moor. Wolfe said, "My commission is at your Royal Highness's service but I refuse". So, great captions are not rubber stamps.

and customs of war which are referred to in Article 6(b) of the Charter".[123]

As far as the defence contention was concerned that Germany had completely incorporated and subjugated the occupied territories during the war and that they were parts of Germany, the court replied: ".... it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them".[124]

With regard to crimes against humanity, the court said, "there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great

---

123. Trial of The Major War Criminals, Vol.XXII, op.cit., p. 497.

124. Ibid., p. 498.

horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The prosecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connexion with, any such crime. The Tribunal therefore can not make a general declaration that the acts before 1939 were crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connexion with, the aggressive war, and, therefore, constituted crimes against humanity".[125]

The IMT at Nuremberg pronounced its judgment on the 30th September and 1st October 1946 and delivered sentences.

---

125. Ibid., p. 498.

Twelve defendants were sentenced to death, namely Goering, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Seyss-Inquart, and Bormann (tried in absentia).[126] Seven defendants, namely, Hess, Funk, Doenitz, Raeder, Schirach, Speer, and Neurath, received terms of imprisonment ranging from ten years to life.[127] Three, namely, Schacht, von Papen, and Fritzsche, were acquitted and freed.[128]

---

126. The death sentences were executed on 16 October 1946. Goering committed suicide earlier.

127. Hess, Funk, and Raeder were sentenced to life imprisonment, and Doenitz, Schirach, Speer, and Neurath to terms ranging from ten to twenty years. All the sentences were confirmed by the Allied Control Council for Germany, and the convicted defendants were incarcerated in Berlin at the Spandau Jail. However, Naurath, Raeder, and Funk were released from prison on medical grounds on November 6, 1954, September 26, 1955, and May 16, 1957, respectively. Neurath died in 1956. Funk and Raeder died in 1960. Doenitz was released on September 30,1956, after serving his full sentence. Speer and Schirach were released on September 30, 1966, upon completion of their terms of imprisonment.

128. Furthermore, the S.S. and the S.D., the Gestapo, and the Leadership Corps of the Nazi Party were declared criminal organisations, while the S.A., the Reich Cabinet and the General Staff and High Command of the German Armed Forces were acquitted.

The Soviet member of the Tribunal, General Nikitchenko, dissented from the Judgment, and declared that Hess should have been sentenced to death instead of to life imprisonment, while Schacht, von Papen, and Fritzsche should not have been acquitted and the Reich Cabinet and the General Staff and High Command of the German Armed Forces should have been branded as criminal organisations. Woetzel, op.cit., pp. 14-15.

The Indictment charged all the defendants under Count One; all but seven (Bormann, Kaltenbrunner, Frank, Streicher, Schirach, Fritzsche, and Schacht) under Count Two; all but four (Streicher, Schirach, von Papen, and Schacht) under Count Three; and all but two (Doenitz, and von Papen) under Count Four. The Tribunal totally acquitted three, namely, Fritzsche, von Papen, and Schacht, from all the four counts. Among the remaining 19 defendants, the IMT convicted only eight (Goering, Ribbentrop, Keitel, Jodl, Rosenberg, Raeder, Hess, and Neurath) under Count One; all but seven (Sauckel, Bormann, Kaltenbrunner, Frank, Streicher, Speer, and Schirach) under Count Two; all but three (Streicher, Hess, and Schirach) under Count Three; and all but three (Raeder, Hess, and Doenitz) under Count Four of the charges.[129]

---

129. Calvocoressi, op. cit., Appendix Two, p. 141.

CHAPTER V

CONCLUSION

Codification of the Nuremberg Principles

The International Law Commission formulated the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", and presented to the United Nations General Assembly in 1950, which accepted them on December 12, 1950.[1] The following are the Principles:

"Principle I. Any person who commits an act which constitutes a crime under International Law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

---

1. Since the Nuremberg principles had been unanimously affirmed by the General Assembly in resolution 95(1) of 11 December 1946, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them. Accordingly the Commission formulated it and submitted, with commendaties, to the General Assembly. By resolution 488(v) of 12 December 1950, the General Assembly decided to send the formulation to the Governments of Member States for comments. The Work of The International Law Commission, Revised Edition, Office of Public Information, United Nations, New York, September 1972, pp.22,82-83.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter setout are punishable as crimes under international law:

(a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War Crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as setforth in Principle VI is a crime under international law".[2]

The central core of the above-mentioned principles is the individual criminal responsibility or liability under international law.[3] It is important, because it led to the "codification of the most basic moral intuition, presupposed by the notion of a crime, namely, that crimes do not happen but are performed by agents; that these agents must carry the burden of responsibility for the crimes - and then, when possible, the burden of punishment; that agents capable of performing and then accounting for crimes are not abstract entities but

---

2. The Work of The International Law Commission, op.cit., pp. 82-83. For a critical examination of each of the Principle see Melzer, Yehuda, Concepts of Just War, A.W. Sijthoff, Leyden, 1975, pp. 60-105. And for a brief background of the codification of these principles see Maugham, Viscount, U.N.O. and War Crimes, John Murray, London, 1951, pp. 102-109.

3. Melzer, ibid., pp. 62-63.

literally persons".[4]

In several other acts, the United Nations confirmed certain principles as valid tenets of international law, the violation of which the IMT and the IMTFE had punished as international crimes.[5] It is said, however, that the Universal Declaration of Human Rights[6] includes certain individual rights which were violated by some of the accused at Nuremberg and Tokyo; and, they were punished for such acts under the London Charter and the Charter of the IMTFE at Tokyo respectively.

---

4. Melzer, ibid. , p.62, and at p. 63 he cites J.H.E. Fried, the then American Special Legal Consultant at Nuremberg, who said, "... the basic message of Nuremberg - policies and wars are made by individuals who are responsible, without recourse to metaphysical excuses". Furthermore, Melzer observed that personal responsibility and liability are notions that do not leave any room for ambiguity,i.e. no possibility is left for finding legal shelters behind the traditional defences based on notions of sovereignty, the Act of State doctrine or other excuse providing inventions. See also Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens and Sons Ltd.,London, 1960, pp. 234-235. He observed that the text of the Principles formulated by the Commission "does not represent a statement of all the principles in the Charter and Judgment of the IMT, but it summarises the main principles applied by the court, particularly as derived from the Charter".

5. Woetzel, op. cit., p.235.

6. The Declaration contains 30 Articles in total. Articles 10 and 11 provide for individual rights relating to penal offences. The Declaration was passed by the General Assembly on December 10, 1948. United Nations General Assembly, Official Records, Third Session (1), Doc.A/810, U.N.Publications, Sales No. 1949, I.3.

Another important international agreement which brands certain acts committed by some of the accused at Nuremberg and Tokyo as international crimes is the Convention on the Prevention and Punishment of the Crime of Genocide, which was unanimously approved by the General Assembly on December 9,1948[7] A further step was achieved in Codifying certain principles evolving from the war trials, when the International Law Commission in 1954, submitted to the General Assembly for its consideration a Draft Code of Offences against the Peace and Security of Mankind.[8]

Article I of the Draft Code declares that "Offences against the peace and security of mankind,are ...crimes under international law, for which the responsible individuals shall be punished".[9] Article 2 of the Draft Code enumerates thirteen

---

7. General Assembly Resolution 260A(III). For the full text see United Nations Treaty Series, Vol.78, p. 277. The Genocide Convention contains 19 Articles. The First Article distinguishes Homicide and Genocide; in the former, individual is the victim whereas the groups in the latter. The Convention enlists certain acts, "if accompanied by the intent to destroy, in whole or in part, a national,ethnical, racial or religious group, constitute the crime of genocide". The Convention approved by the General Assembly by a vote of 55 to 0, entered into force for 43 countries, pursuant to its terms on January 12, 1951. The concept of Genocide, it is said, is a specific and independent codification of crimes against Humanity. See Melzer, op.cit., p. 94.

8. See The Work of The International Law Commission, op.cit., pp. 27-29, 83-84.

9. Ibid., p. 83.

different offences against the peace and security of mankind, e.g. act or threat of aggression; organisation of armed bands; undertaking or encouragement of civil strife or terrorist activities in another State; acts in violation of treaty obligations;[10] annexation, intervention, genocide, crimes against peace, war crimes, and crimes against humanity including conspiracy to commit any such offences. Article 3 ruled out the defence of 'Head of State' or 'responsible government official' for committing the offences; whereas, Article 4 ruled out the plea of Superior Orders for the defendant only "if, in the circumstances at the time, it was possible for him not to comply with that order".[11]

The Draft Code is important because it dealt with the criminal responsibility of the individual in international law and not crimes by abstract entities.[12] Furthermore, the Draft incorporated various Nuremberg principles including 'Conspiracy' to commit the offences. In doing so the Draft Code was limited

---

10. Such as, restrictions or limitations on armaments, or on military training, or on fortifications etc. see ibid., p. 84.

11. Articles 3 and 4, Draft Code of Offences against Peace and Security of Mankind, The Work of the International Law Commission, op.cit., p.84. For the problems of Superior Orders, 'Head of State' or 'responsible government official', see previous Chapters.

12. The Work of the International Commission, op.cit.,p.88, and compare the Judgment of the IMT at Nuremberg, "Crimes against international law are committed by men,....." at Chapter IV.

only to "offences containing a political element and endangering or disturbing the maintenance of international peace and security"; it omitted matters like piracy, traffic in women, children and dangerous drugs, slavery etc.[13]

The Draft Code raised problems closely related to that of the definition of aggression, and it has been discussed earlier[14] that in 1974, the U.N. General Assembly adopted by consensus the "Definition of Aggression". This can be said to be another step forward in the field of codification of international criminal jurisdiction.

Subjects of International Law - States?

Whatever might have been the progress in the field of individual responsibility or liability under international law, some writers still maintain that international law apply only to states, and not to individuals. This again, raises the most controversial question: does international law apply to individuals as well as to states? Or, are individuals subjects of international law?

On this controversial issue, mainly four schools of thought can be distinguished, presenting approximately the

---

13. The Work of The International Law Commission, op.cit., p. 28.
14. Chapter 4.

following doctrines: (1) The individual has no legal personality; this attribute is reserved for States; (2) The individual is the object, not the subject, of international law; (3) The legal personality of the State is fictitious; only individuals are the "real" subjects of international law; (4) States are the "normal" subjects of international law, but the validity of rules concerning individuals is not excluded.[15]

The overwhelming majority of writers on international law advocate that states only be recognized as legal persons in international law.[16] Through constant repetition, the unqualified designation of the State as the only legal person

---

15. Aufricht, Hans, "Personality in International Law", American Political Science Review, Vol.XXXVII, April, 1943, No. 2, p. 229.

16. Ibid., p. 217: "Since, however, neither the term 'State' nor the term 'legal personality' is unequivocal, it may well be questioned whether a conclusion reached by means of a mere combination of these terms is adequate to clarify the pertinent problems". And see at pp.217-218: "Thomas Hobbes originated the usage of speaking of the "State" as a "person", when he proposed to define a "body politic" as "a multitude of men, united as one person by a common power". Modern States are characterized as corporate persons by many writers; For the comparative legal personality of the Holy Sea, group of insurgents, composite corporations, the P.C.I.J., and the League of Nations, see ibid., pp.220-225.

in international law became seemingly self-evident. One of the reasons why the individual is not considered as enjoying legal personality under international law seems to be that those criteria which are inherent in the State's corporate personality can not be shown as characteristic of the private individual.

In principle, the individual is not entitled to act independently of his position within the corporate personality, or to bring about legal effects through independent and direct actions.[17] Moreover, the individual is differentiated from the organs of the State. It is said that within a State as a corporate personality of a hierarchic structure (Societas inequalis) the individuals who act in a public capacity are deemed superior in their relation to the subjects. Furthermore, another criterion of the State's personality cannot be claimed by the individual in his normal legal position - the attribute of sovereignty; for the State holds, in general, the highest rank within an assumed hierarchy of personal units.[18] Finally,

---

17. This legal situation may be explained by the individuals status within a corporate body, which latter is regarded as a legal entity with respect to the outside world. See Aufricht, "Personality in International Law", op.cit., p.229.

18. Aufricht, ibid., p. 230. Nevertheless, there are special rules of international law which disregard this hierarchical structure of the personal units and treat the individual as the immediate addressee of international law. In these exceptional cases, the question of the priority of rank among the different legal units becomes irrelevant.

the individual is not considered an institution. An individual may act on behalf of an institution; he may, time and again, perform the same acts in exercising his profession, yet, even the continuance of such an activity during a considerable period will not confer upon an individual character of an institution.

Therefore, it is argued that States are the only subject of international law because: (a) they meet in International Conferences to determine rules to govern their respective claims and to provide ways and means of International Co-operation; (b) delegates in such conferences speak for their respective states, and the decisions bind states in their corporate capacity; (c) only States can be members of the United Nations and parties before the International Court of Justice;[19] (d) States maintain the diplomatic representatives, and through them negotiate with one another for the protection of their national interests; (e) States enter into treaties, bilateral and multinational, creating rights and duties and superseding the existing law; and (f) individuals denied rights in a foreign

---

19. Article 34 (1) of the Statute of the International Court of Justice provides: "Only States may be parties in cases before the Court". See Oppenheim, L., International Law, (Ed.by H. Lauterpacht), 8th ed., 1955, Vol. 1,p.21, and at p.20:"States create International Law". And for the proposed modification of Article 34 see Lauterpacht, "The Subjects of the Law of Nations", Law Quarterly Review, Vol. 63, 1947, pp. 438 ff.

state seeks the protection of their own states, and the Laws of War attaches enemy character to all Belligerent citizens whether they favour or not their own country's policy.[20]

Oppenheim maintains the traditional view that: "International law is a law between states only and exclusively".[21] Moreover, he writes, "Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are states solely and exclusively".[22]

---

20. Fenwick, Charles G., International Law, 3rd ed., 1948, pp. 129-131.

21. Oppenheim, International Law, op.cit.,Vol.1, p. 458.

22. Ibid., Vol.1, p. 19.According to the dualist group of thought which maintains that international law is exclusively inter-state law distinct from national law, and can only apply to individuals if it has been transformed (by a Special Legislative or Constitutional provision) into national law. See Noetzel, op.cit., pp. 100-101. Also see Hudson, Manley O., International Tribunals - Past and Future, Carnegie Endowment For International Peace and Brookings Institution, Washington, 1944, p. 180: "International law applies primarily to States in their relations inter se. It creates rights for States and imposes duties upon them, vis-a-vis other States".

Ralston also takes the position that only sovereign States are subjects of international law; therefore, the only injury, and subsequent claim, belongs to the State. Similarly, Sir John F. Williams maintains that an individual cannot "violate International Law". All that he can do is (a) to violate the law of his own State by doing something which is a contravention of that provision (if any) of the municipal law of the State which enjoins individual conduct in harmony with the rules of International Law; or (b) so to behave that he involves his State in responsibility for his acts, and thus makes it in its turn ... a violation of International Law. In the former case, he is justiciable by the Courts of his own country; in the latter, not he, but his State, is amenable to such sanctions as International Law may impose - and the sanctions of International Law are more readily applicable to violation of the law of peace than to violation of the law of war.[23]

However, this traditional concept of states as the only subject of international law has been attacked by numerous writers from a variety of approaches.[24] The war trials also

---

23. Quoted from Gormley, W. Paul, The Procedural Status of The Individual Before International And Supranational Tribunals, Martinus Nijhoff, The Hague, 1966, note 19, pp. 23-24; In this sense Sir J.F. Williams writes: "A Legal System can not be said to recognize rights as belonging to persons, when it does not allow those persons to deal with those rights". See his Chapters on Current International Law, 1929, pp. 5 ff.

24. Jessup, Philip C., A Modern Law of Nations, The Macmillan Company, New York, 1950, p. 15.

rejected this concept). It has been conceded, of course, that the private individual may be given indirect benefits, protection, or even substantive rights in certain limited areas; also exceptions to the traditional concept exists in case of certain international organisations and certain groups.[25]

Individual as the Object

Significantly, a number of very distinguished scholars hold that the private individual, especially the citizen, is an object, but not a subject, of international law. This object-theory is primarily based upon a specific interpretation of the individual's position within the corporate unit of the state. It is argued by some that the state is the only addressee of international norms, wherefore, by the very definition of international law, the individual cannot be held a subject in this sphere of law. Especially the tie of allegiance which holds together citizens and their states precludes allowing the private individual the right to act independently of the corporate body to which he belongs. According to the view of others, the individual is only

---

25. Gormley, op.cit., pp. 25, 31. Exceptions to the traditional concept exists in case of U.N., I.L.O., Red Cross etc and groups as Catholic Church and certain belligerent government, for limited purposes.

partly subject to international law, since he is allegedly subject to duties without having any rights, and for this reason the term 'object' is to be preferred.[26]

It should be mentioned here that the term 'subjects' in general jurisprudence means persons to whom law attributes rights and duties, whereas 'objects' are things in respect to which rights are held and duties imposed.[27]

The problem, whether individuals are 'subjects' or 'objects', becomes more complicated due to (a) the difficulty of distinction between substantive and procedural law, and (b) the terms 'subjects' and 'objects' are taken from the municipal law without taking into account the differences in the practical application of the terms.[28]

To quote Spiropoulos: " A subject of the law is one to whom the rules of a juridical system are immediately addressed, that is to say, one who is directly qualified or obligated by the rules of a juridical system."[29]

It is clear that the object theory presupposes, inits comparison of states and individual, a complex state-personality,

---

26. Aufricht, op. cit., pp. 230-231.

27. Fenwick, International Law, op.cit., p. 129.

28. Ibid.

29. Quoted in Fenwick, op. cit., p. 129.

composed of a multiplicity of members of different legal levels. Additional evidence in favour of this argument is to be seen in the different legal treatment of individuals, dependong on whether they act in public or private capacity.

Briggs is of the opinion that: "The individual lacks procedural capacity under international law, except where it is conferred upon him. That is, he cannot sue in an international court to obtain enforcement of rights stipulated by treaty or customary international law in his behalf except where such procedural capacity is conferred upon him".[30] Under his view, the great majority of treaties are made to benefit individuals rather than to protect States. For instance, many treaties have involved the right to travel in foreign countries, to carry on trade, and the protection of public health and morals. Briggs concluded therefore, that individuals are objects and not subjects of international law.

The object-theory has been challanged on the ground that it is illogical to apply a double standard to domestic and international law, namely, to recognize a definite legal entity as a person or a subject under municipal law, but at the same time to consider it as a mere object in the international sphere. Besides being illogical, it is argued that this theory

---

30. Briggs, H.W., The Law of Nations, London, 2nd ed., 1953, p. 94.

is incompatible with the general principles of law recognized by the civilized nations (Article 38(c), Statute of the P.C.I.J.)[31] when it considered the same person as a subject in domestic, but an object in international law.[32] The war trials also discarded this view. However, it might be added that an argument based on the "general principles of law" would not necessarily exclude the assumption that an individual's range of rights might not be the same in international as in domestic law.

Individual as the "Real" Subject

Another group of international lawyers consider the individual as the only "real" subject in international law. Paradoxically enough, even this school of thought presupposes the corporate personality of the State.

Thus Scelle has criticised the traditional view of international law as exclusively inter-state law. He refutes the traditional term "international law" on the ground that it tends to reduce the concept to interstate relations between States only, while in reality these relations should be

---

31. Anand, R.P., Studies in International Adjudication, Vikas Publications, Delhi, 1969, pp. 153-154,159-160.

32. Aufricht, op.cit., p. 231, See also Westlake, J., Chapters on the Principles of International Law, 1894, pp. 1-2.

described and analyzed as relations among individuals. Furthermore, Scelle disagrees with the traditional theory regarding the legal personality of the State, or State as a juridic or moral person. He adopted the fiction theory concerning the 'reality' of the corporate personality. He argued that the State is unreal, because as a corporate entity, a moral person, it can not have a will of its own, that is to say, a will other than that of the individuals which comprise it. Therefore, the corporate personality of the State is fictitious and inadequate for scientific analysis.[33]

Similarly, according to J.B. Scott all the doctrines of so-called state personality are fictitious for two reasons: first, the State, like any other corporation, is composed of human beings; second, its ultimate purpose is the welfare of these human beings. He writes: "If we must have the term "state", let us have the State a humanized organisation, a creation of human and therefore moral beings, an agency to meet human

---

33. Ibid., p. 232: "Scelle's argumentation against the "State" as a legal entity would, consistently applied, lead ultimately to an anarchic individualism, because it overlooks the potentialities of legal organisation by means of corporate structures". And compare Eagleton, C., The Responsibility of States in International Law, New York, 1928, p. 44: "Externally regarded, the State is an individual unity, speaking with one voice, even if speaking through many mouthpieces".

necessities".[34]

However, to deny the State is its peculiar corporate character, on the ground that the purpose of the State is "the good life" of the individuals, constitutes a confusion between the structural and the functional approach; for it is certainly conceivable that an "abstract entity" may have real effects. The fact that the true or alleged purpose of the State is to foster the welfare of its individual members seems, therefore, not a sufficiently convincing argument against the corporate character of the state; for to reduce the State to the legal status of its individual members would in the last analysis lead to the denial of "government", and thereby to anarchy.

---

34. Scott, J.B., Law, The State, and the International Community, New York, Vol. 1, 1939, p. 28. He further said, "Indeed, however, we may define the state - and the definitions are many and various - we can only pretend that it is a person". Aufricht, however, comments that this description is an over-simplification for the structure of the State. The "will" and the action of the State differs from that of the individuals; only the "declared will" and not its formation, counts in international relations. Quite a different proposition, however, is the political question whether a State that disregards the personality of its individual members fulfills the true mission of an ideal state. See Aufricht, op.cit., p. 233; Brierly, The Law of Nations, 1955, p. 56: The States "have no wills except the will of the individual human beings who direct their affairs".

Yet, several writers hold that individual is the primary unit of society, both at national and international plane. Various arguments too are advanced to justify the proposition: that States are "artificial bodies" formed by the chance of historical circumstances; that States enjoy corporate character because it represents a particular group of individual's desire, promotes their interests, and protects their fundamental and inalienable rights; that the State is indeed 'natural to man'; that the State exists for man, and not man for the State; and that the corporate character of the State does not give it the right against individuals, rather it is a practical necessity, realised due to the difficulty of organising an international community of the individuals.[35]

Thus Stowell observes: "Fundamentally the Law of Nations is a law of individuals, enforced through the agency of the

---

35. Fenwick, International Law, op. cit., pp. 132-133. He cites the U.S. Declaration of Independence that the "Government exists by the consent of the governed; they are agents of the people, acting under their control and obedient to their injunctions." Furthermore, international law never gives the States the right to disregard the inherent and inalienable rights of its citizens. In a federation, the federal law is applicable to individuals and not only to member states. See also Goodhart, A.L., "The Legality of the Nuremberg Trial", Juridical Review, April 1946, pp. 7-8.

governments of the communities into which mankind is apportioned".[36]

Accordingly Brown writes: "The most serious error committed by the defenders of international law has been found in their parrot-like reaffirmation that it applies only between sovereign States".[37]

Manner, perhaps goes to the extreme when he says that the individual came to be regarded after the First World War, as "the final end, a beneficiary, and a potential subject of International Law".[38]

---

36. Stowell, E.C.; International Law, New York, 1931, p.8. Furthermore, he writes, "There is, therefore, a certain justification in recognising that States share with individuals the character of subjects of international law". Again in the Proceedings, American Society of International Law, 1935, at pp.65 et seq., he writes that the individual is a subject of international law in two ways (a) as an individual, and (b) through his nation, which also exists as a separate entity.

37. Brown, P.M., "The Individual and International Law", American Journal of International Law, Vol. 18, 1924, p. 532, His plans for "World Assembly". See American Journal of International Law, Vol. 40, (1946), p. 160; Also see the same Journal, Vol. 38 (1944), at p. 281 for his views on the subject.

38. Manner, George, "The Object Theory of the Individual in International Law", American Journal of International Law, Vol. 46 (1952), p. 433. In this sense see F.S.Dunn. "The International Rights of Individuals", Proceedings, American Society of International law, 1941, pp.14 et seq.

However, there can be little doubt that the argument that individuals are the only "real" subject of international law, is a theoritical one, mainly directed against the Absolutism of State Sovereignty. Furthermore, this argument is advanced impending the progress of an International Government.[39]

Individual as the "Normal" Addressee

Another school of thought proposes to designate the States, in the sense of international law, as the "normal" addressees of international law. This means that the State as well as the individual may be the author or addressee of legal acts which bring about legal effects in the sphere of international law.[40]

However, the term 'normal' requires satisfactory explanation, because it can be interpreted variously. The statement that the States are the normal addressees of international law might mean that most of the international norms are addressed to states. But this statement is correct only in sofar as customary and international treaty law is concerned.

---

39. Fenwick, op.cit., pp. 132 et seq., And Compare Oppenheim, International Law, Vol. 1, op.cit., p. 737.

40. Aufricht, op.cit., pp.233-234. Supporting the line of argument he writes: "It must again be emphasised that the structural character of the individual's personality differs widely from that of the States".

For the "general principles of law recognized by civilized nations" are, by definition, not addressed primarily to states; otherwise they would be classified under the heading of customary law. Reference to states as the normal persons in international law points furthermore to the peculiar legal structure of the State; in other words, the corporate structure of the state is deemed the "normal" one, while the private individual is seen as an extraordinary legal phenomenon in international legal relations. Moreover, the attribute "normal" might indicate that individuals became addressees of international law exclusively by virtue of special agreements between states; wherefore it is sometimes argued that the legal personality of the State is, in the last analysis, derived from the will of the States.[41]

---

41. Aufricht, ibid., pp. 234-235. See Hambro, "Individuals before International Tribunals", Proceedings, American Society of International Law, 1952, p. 22 et seq.; Jenks, "The Scope of International Law", British Yearbook of International Law, Vol.XXXI, 1954, p. 49; Borchard, "The Access of Individuals to International Courts", Proceedings, American Society of International Law, 24 (1930), p. 359. Many writers distinguish the individual as a subject of international law from the individual as a creator of norms. See Jessup, A Modern Law of Nations, op.cit., note 11, p. 17; Friedmann, "The Growth of State Control over the Individual, and its Effect upon the Rules of International State Responsibility", British Yearbook of International Law, 19 (1938), p.118; Cutler, "The Treatment of Foreigners", American Journal of International Law, Vol.27, 1933, pp.225-226; Svarlien, "International Law and the Individual", Journal of Public Law, Vol.4, 1955, p. 147; Schwarzenberger, G., International Law, London, 1949, p. 25; Starke, J.G., An Introduction to International Law, London, 1947, p.59.

Finally, the qualification of the state as the normal "person in international law might mean that there exists quasi-unanimous agreement among the writers on international law that the states are the subjects in international law; while only a comparatively small number dissent and propose to use the term "personality" in a broader sense. Whether this status of the doctrine can influence any actual decision depends upon the weight of authority ascribed by a court to "the teachings of the most highly qualified publicists of the various nations".[42]

Philip Jessup said that "individuals as well as states were considered subjects of the law of nations" and, therefore, "international law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states".[43]

---

42. Article 38(d) of the Statute of the P.C.I.J. See Anand, op.cit., p. 164, and comments thereof at pp. 160-162.

43. Jessup, Philip C., A Modern Law of Nations, op.cit., pp. 16, 17, esp. at p. 18: "It is true to say that states themselves operate by virtue of the will of individuals and that the individual is thus the ultimate source of authority". Also see his article "Force Under a Modern Law of Nations", Foreign Affairs, Index Volume 25 (Nos. 1-4), October 1946 - July 1947, at p. 97: "A modern Law of nations must also reject the traditional notion that international law is law only between and among states; it must accept the principle that international law directly binds the individual".

The International Military Tribunal at Nuremberg held: "That international law imposes duties and liabilities upon individuals as well as upon states has long been recognised".[44] This opinion was also concurred at the Tokyo trial.[45]

Lauterpacht observed that, "In no other sphere does the view that International Law is binding only upon states and not upon individuals leads to more paradoxical consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war".[46]

Individual as the "Beneficiary"

Several authors who hold that the individual is either a subject or an object of international law, also recognize that he may be a "beneficiary" in that sovereign states may expressly confer certain procedural rights upon him. Under this "middle theory" the citizen is recognized as having full positive rights but lacking an effective legal remedy.

---

44. Trial of The Major War Criminals before the International Military Tribunal, Nuremberg, Vol.XXII, 1948, p. 465. And for similar observations in the Ex parte Quirin case (1942-317, US-1), See Chapter IV of this work

45. Horwitz, Solis , "The Tokyo Trial", International Conciliation, No. 465, November 1950, pp.550 et seq.; also see Chapter IV of this work.

46. Lauterpacht, H., "The Laws of Nations and the Punishment of War Crimes", British Yearbook of International Law, Vol. XXI, 1944, p. 64.

For instance, it has been said that such phases of international law as the laws of land and naval warfare, conservation of natural resources, drug traffic, slavery, piracy, etc., confer rights and duties upon individuals that can only be enforced at the instance of a sovereign State. Moreover, as in the case of drug traffic, slavery, or piracy, it is often necessary for the municipal courts of some country to enforce the applicable international law, since no permanent supranational tribunal exists that can deal with such breaches of the law of nations. Inshort, therefore, States are not the only subjects of international law; but, as a practical matter, private persons have less capacity to sue in an international tribunal than does a State; and an international organisation has less capacity than a State but greater standing than a person. In addition, stateless persons may have less capacity than nationals.

This middle position, which recognizes the individual as a beneficiary of the law, has been well summarised by Cowles: "It does not belittle international law to have subjects which do not have a full capacity for rights".[47] Cowles thinks

---

47. Cowles, W.B., "The Impact of International Law on the Individual," Proceedings, American Society of International Law, 1952, note 29, p. 76. Also it is argued that members of diplomatic corps are protected by international law. Members of the armed forces have a special legal position as do government officials abroad on technical missions, for they hold "special" rather than diplomatic passports, while aliens and foreign corporations also have a type of "status" under the law of nations. See Gormley, op.cit., p. 27.

that an individual is not merely an object, because he has definite substantive rights under the law of nations, but he lacks the standing to seek a remedy before an international tribunal.[48]

When, according to this middle theory, the individual is neither an object nor a subject of law, rather, he lies in an in-between category, naturally, question may arise as to what is the exact legal "status" of the individual?[49]

However, according to Fenwick: "It would seem unreal to say that individuals are not in some degree subjects of international law, at least in respect to the rules of substantive law. In respect to procedural law, while the individual must in general look to his state for the enforcement of his rights, there is the precedent of the minority

---

48. Ibid.,pp. 76, 83. At p.83, he writes: "It is not at all necessary, in order to be a subject of international law, that the individual himself have a plenary position to have his rights under this branch of law enforced in every forum, international as well as local".

49. Gormley, op.cit., pp. 26-27. Should the individual's status be compared with the status of wives under the old common law, slaves in Rome and in the United States, serfs in many legal systems, or infants and incompetents under current legal practices? No doubt, such persons are beneficiaries even if not fully sui juris, for they have "status" and a "degree of protection" under the rule of law. If, even in Municipal Law, the individual can be more than a mere object in spite of the fact that he is not a full subject, the object theory should be rejected, since it does not follow that, if a person is not a full subject, he must necessarily be an object.

treaties concluded after the first World War to mark the tendency to create international machinery for the protection of fundamental rights.[50]

Hans Kelsen, while supporting the positivist position admits that there are areas where international law applies directly to individuals. He states: "There are, however, important exceptions to the principle that States are the subjects of International Law, that is to say, that International Law binds individuals only indirectly and establishes collective responsibility. There are rules of General International Law by which obligations of individuals are directly stipulated, (not actions of the State). Typical cases of direct obligation of individuals by General International Law, combined with individual responsibility for their violations of the law, are the rules concerning piracy, breach of blockade, carriage of contraband .... (etc.), also acts committed on the territory of State X which injures another state, war crimes

---

50. Fenwick, op.cit., pp. 134-135. See also Hyde, C.C., International Law. Boston, 1945, p. 474: "Individuals committing piratical acts are directly subject to certain substantive rules of international law ... Individuals committing acts of brigandage on land are subject to international law. Such individuals have a procedural right to a trial before punishment, like the spy's right to a trial, can have its source in no other branch of law than international law".

and subsequent punishment of prisoners".[51]

According to Quincy Wright: "The rights of States must be considered relative to the rights of individuals. Both the State and individual must be considered as subjects of world law and the sovereignty of the State must be regarded not as absolute, but as a competence defined by that law. Such a development, however, implies that the world community is sufficiently organised and sufficiently powerful to assure the security of States under law".[52]

The glaring weaknesses of this middle position seem obvious. Injured individuals are unable to obtain effective

---

51. Kelsen, H., "Collective and Individual Responsibility for Acts of State in International Law", Jewish Yearbook of International Law, (1948), pp.226, 229. Furthermore, Kelsen writes: "The delictus is always directly determined by International Law; and a State applying a sanction indirectly determined by International Law is executing International Law even if it is executing at the same time its own national law, criminal or civil." Also see Kelsen, General Theory of Law and State, Harvard University Press, Second Printing, 1946, pp.93 et seq.

52. Wright, Q., Human Rights, Maritain ed., n.d., 1950, pp. 149,150: "The responsibility of the State and the power of the United Nations must be so interpreted as to give assurance that every individual will enjoy human rights"; Lachmann, The Renaissance of the Individual, 1947, pp. 3-4: "Universal Law"(is) valid for all individuals and protects them against any infringement of their legal status as individuals".

redress, with the result that the "rule of law" remains an ideal rather than a reality. The beneficiary theory, therefore, falls short of its desired goal.[53]

Criminal Liability of the Individual

If, it is admitted that the individual is a subject of international law, should it be inferred that he is equally responsible for criminal acts committed under international law?

In this context, it is necessary to observe the decisions of the war trials, particularly that of the International Military Tribunals at Nuremberg and Tokyo, and to assess individual accountability for international delicts. It is sure that the war trials established "important precedents for the development of international law concerning the definition of certain crimes, ...and concerning the criminal liability of individuals in international law."[54]

---

53. The only relief available to a beneficiary must come from a specific agency such as the High Commissioner for Refugees of the U.N., the International Red Cross, the International Labour Organisation, the Economic and Social Council, etc. The particular organ must instigate and press the "case" rather than the injured party, lacking the right of direct action. Gormley, op. cit., p. 38.

54. Wright, Quincy, "The Law of the Nuremberg Trial", American Journal of International Law, Vol. 41, 1947, p. 42.

One of the conclusions of the first great international trial at Nuremberg was that individuals as well as states can be subjects of international law. It was held: "That international law imposes duties and liabilities upon individuals as well as upon states has long been recognised"[55]. This principle was accepted by other subsequent trials including the Tokyo trial. And this is a rejection of the traditional approach and positivist concept of international law that only sovereign states are its subject. This also is a refusal of the object theory, discussed earlier. Similarly, the International Court of Justice held in a case[56]:

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of

---

55. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 466, c.f. For similar decisions in the cases of Ex parte Quirin (1942-317, US-1) and Yamashita (327- U.S.1, 66S.ct. 340). See Chapter IV of this work.

56. Although Article 34(1) of the ICJ provides that "Only states may be parties before the Court", the Court in the Reparation for Injuries Suffered in the Service of the United Nations case extended international personality to entities other than states and discarded the technicalities of the doctrine of nationality of claims. Anand, op.cit., p. 175. Also see Gormley, op.cit., pp. 62 et seq.

international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States".[57]

It can be concluded therefore that non-state entities, including individuals have acquired subjectal status under the modern International law, although further improvements are yet to be made.

The question of criminal responsibility or obligation of the individual under international law was made clear in the Nuremberg Judgment when it declared that "crimes against international law are committed by men", not by impersonal entities, and only by punishing such men can the provisions of international law be enforced.[58] The United Nations has approved this principle in various resolutions.[59]

This, naturally, rejects the idea that international law is a law between, but not above sovereign States, and the very idea of punishment is repugnant to its fundamental notions. Two contradictory reasons are usually advanced to support the contention that international law is doubly

---

57. Anand, op. cit., p. 175.

58. Trial of The Major War Criminals, op.cit., Vol.XXII, p. 466.

59. Discussed earlier in this Chapter.

impotent : (1) because it is legally inadmissible to punish the State as such on the ground that the corporate entity of the State can not properly be deemed to possess a criminal intent and be the object of criminal punishment in the persons of its organs; and (2) for the alleged reason that it is legally improper to punish individuals on the ground that the precepts and the injunctions of international law are not addressed to individuals but to the corporate entity of the State.[60] The war trials have discarded these contentions. On the other hand, the war trials established the following fundamental and significant principles: (1) that there are certain standards of conduct, generally observed in civilized countries, which all men are bound as a matter of international law to observe; (2) that men who violate these international standards are criminals and may be convicted and punished under international law by tribunals established to enforce that law; and (3) that these standards proscribe and make criminal under international law the deliberate planning and launching of an aggressive war, violations of the laws and customs of war generally observed among belligerents, and certain categories of inhuman persecutions of racial, religious, or other groups.[61]

---

60. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", op. cit., p. 58.

61. Taylor, T., "The Nuremberg War Crimes Trials - An Appraisal", Proceedings of the Academy of Political Science, Vol. XXIII (1948-1950), p. 341.

Now, if the individuals are subjects of international law, and if crimes against international law are committed by men, not by abstract entities, then should it be concluded that individuals are exclusively and the only subjects of international criminal law?

War Trials and Individual Liability

The war trials, moreover, established another principle that Crimes against Peace had a basis in international law, and the individuals committing those crimes are punishable under the modern law of nations. As Philip Jessup observed that the "net result of the war trials, however, ... must lead to the conclusion that the waging of aggressive war is considered an international crime regardless of whether the anthropomorphic fiction of the state or the flesh-and-blood cabinet or military officer is held liable to punishment.[62] The definition of Aggression, adopted by the U.N. General Assembly in 1974,[63] defined in Article 5 that: "A war of aggression is a crime against international peace", and further "Aggression gives rise to international responsibility"[64]. Of course, in this definition there is no reference to

---

62. Jessup, A Modern Law of Nations, op.cit., p. 161.

63. Resolution 3314, General Assembly Official Records, 29th Session, Supplement No. 19 (A/9619), United Nations, pp. 10-13. See Chapter IV.

64. Article 5 of the Definition of Aggression. See Chapter IV.

individual liability for aggression, which has been clearly outlined in Principle VI(a)(i) of the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" and Principle 1 of which also provides for individual liability.[65] As mentioned earlier those principles were adopted by the United Nations. This permits the conclusion that individuals responsible for "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances" are liable to punishment.[66] But the experience of Tokyo Trial and the High Command Trial cautions the application of this principle to a precise legal sphere and to restrict liability only to those who were on a "policy-making level" or the "real authors" of aggressive war.[67]

---

65. Principles 1 and VI(a)(i) of the Principles of Nuremberg Charter and Judgment. For the full text see earlier paragraphs of this Chapter.Cf.Article 2(1) and 2), and Article 1 of the Draft Code of Offences against the Peace and Security of Mankind. See earlier discussions in the current Chapter.

66. Jessup, in this sense, comments:"Under the traditional law the full acceptance of the illegality of war would have led to the conclusion that the state which waged war would be guilty of an illegal act; under the current development it is the individual who is held to have committed an Internationally criminal act". Jessup, A Modern Law of Nations, op.cit., p. 161, cf. Judge Biddle reported "Aggressive war was once romantic;now it is criminal". Department of State Bulletin,Vol.15, No. 6 (November 24, 1946), p. 956.

67. Brand, G., "The War Crimes Trials and the Laws of War", British Yearbook of International Law, Vol.XXVI, 1949, p.480.

Similarly, "conspiracy" as an offence, must be restricted in its application. Of course, "conspiracy" as a separate offence could not be established in the war trials. Rather, it was held that conspiracy should be "clearly outlined in its criminal purpose", and should not be too far removed from the time of decision and of action.[68] But the existence of conspiracy to commit acts of aggressive war as an offence, has been recognized by some war trials and individual liability for such acts were established. Furthermore, Principle VI(a)(ii) of the "Nuremberg Principles" adopted by the United Nations provided for individual punishment for "Participation in a common plan or conspiracy"[69] to commit acts of aggressive war. Similarly, the Draft Code, of Offences provided that conspiracy to commit certain offences, are offences against the peace and security of mankind.[70]

So far as War Crimes are concerned, it is clear that the individuals captured as enemy persons and found to have been guilty of acts in violation of the customary rules of war have been, in the past, punished by states whose nationals were outraged. International law, it is said,

---

68. Trial of The Major War Criminals, Vol.XII, op.cit., p. 467.

69. Principle VI(a)(ii) of the Nuremberg Principles.

70. Article 2(13)(i) of the Draft Code of Offences against the Peace and Security of Mankind.

demands not only the punishment of the individuals guilty of war crimes, but also requires that such punishment should be in accordance with international law which should ensure "fair trial".[71] Moreover, it should be noted that each and every violation of the rules of warfare can not be war crime.[72] The war trials, re-established the point that the rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings.[73] But while punishing for war crimes, the factor "military necessity" should be weighed properly. As O'Brien has said: "Proportionality of acts of war must, therefore, be determined upon the relation to the means employed and a legitimate military end".[74]

Although the Nuremberg Tribunal declared "murder" to be a war crime "for which the guilty individuals were punishable" has been "well settled to admit of argument" the decision of the Tokyo Tribunal, where "Murder" existed as a separate Count, was conflicting because it was connected with the "unlawfulness" of the war.[75] Similarly, regarding

---

71. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", op.cit., p.59. Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2,3,4,46, and 51 of the Geneva Convention of 1929 contained provisions for war crimes and are discussed earlier in this work.

72. Ibid., p. 78.

73. Ibid., p. 64.

74. O'Brien, William V., "The Meaning of Military Necessity in International Law", World Politics, Vol.1,1948, pp. 109-171.

75. See Chapter IV for discussion.

killing of hostages", which is established as a crime in International Law[76] and has been incorporated in various national war crimes laws[77], was declared legal, under certain circumstances, in the Hostages trial. The Tribunal acting in the Hostages trial held that, subject to a number of conditions, the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories was legal.[78] Again, uncertainty of international law exists on the question of "use of prisoners of war in the construction of fortifications". Although "ill-treatment of Prisoners of war" has been branded as a war crime in the major war trials, and subsequently approved by the United Nations, it was held in the High Command Trial that the "orders providing for such use (of prisoners) from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal

---

76. Article 46 and 50 of the Hague Regulations, Article 6(b) of the IMT Charter, Principle VI(b) of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and intthe Judgment of the Tribunal.

77. Killing of hostages in the War Crimes laws of Australia, Netherlands, and China, constitute a war crime. Also it is a crime according to French War Crimes Ordinance of 28 August, 1944.

78. For the Hostages Case see Chapter One. Also see Law Reports, Vol.VIII, pp.77-78; cf. The Trial of Albert Kessel ring by the British Military Court at Venice from February to May 1947. See Brand, op.cit.,p.426; Lauterpacht, "The Law of Nations and the Punishment of War Crimes", op.cit., at p.76: "But, as a rule, an act committed in pursuance of reprisals, as limited by international law, can not properly be treated as a war crime ... International law regulates, in a necessarily rough and indeterminate manner, the occasions for and the use of reprisals both in peace and in war".

on their face".[79] Confusion also is created on the question of "plunder of public or private property" when in the Flick Trial it was held that, "a distinction could be made between industrial property and dwellings, household furnishings, and food supplies of a persecuted people.[80]

However, the trend of judicial opinion which bases the law relating to economic offences in occupied territories solely upon violation of the property rights of the individual is also interesting in this connexion; it is a possible further indication of the increasing importance which is being attached to the protection of individual rights by international criminal law.[81]

International law, in the past, was interpreted to mean that a war criminal may be punished with death, whatever crime he may have committed; but the remarkable advance made in the recent war trials is that punishment should be

---

79. See Chapter IV for discussion; Also see Law Reports, Vol. XV, pp. 103-105.

80. Brand, op.cit., pp. 422-423: This "left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as burning his house or depriving him of his food supply or his paid employment) could not constitute a crime against humanity".

81. Brand, op.cit., p. 415.

proportionate to the crime[82] and should be ensured through a fair trial.

Another significant aspect of the war trials from the point of view of international law is the fact that offences committed by persons against their fellow nationals have been punished by the courts of other nations. This indicates the trend towards a greater protection of individual rights under international criminal law. Crimes against humanity have been interpreted to be crimes committed by persons against their own fellow citizens, of course " in execution of or in connexion with any crime against peace or any war crime".[83] Crimes against humanity have been codified in a more specific and independent way under the concept of Genocide, discussed earlier in this chapter.

---

82. There can be, however, no "appropriate" punishment for a crime because man's capacity for deviltry too far exceeds his capacity to absorb punishment. One man may destroy millions of lives over a series of years, but he can be made to die but a single death. On this earth there is no way to 'make the punishment fit the crime', even for those who break the peace of the world. Efforts to find it must always end in confusion, frustration or remorse. See Hoover, Glenn, E., "The Outlook For War Guilt Trials", Political Science Quarterly, (March 1944), Vol.LIX, p. 48.

83. See Principle VI(c) of the Principles of the Nuremberg Charter and Judgment.

Furthermore, the crimes against humanity as enlisted, in the Principles of the Nuremberg Charter and Judgment, have been endorsed by the United Nations[84] representing the international community. Also it has been defined in Article 2(10)(11) of the Draft Code of Offences against the Peace and Security of Mankind.[85]

It is also recognised now that the plea of superior orders can not be used as an absolute defence against any crime in international law; it may only justify mitigation of punishment[86] "provided a moral choice was in fact possible". Neither the Head of State, nor any responsible government official, can shield themselves behind the Acts of State doctrine to escape from criminal liability under international law.[87] Furthermore, it is established that a criminal can be punished under international law, whether or not such punishment has been provided in the internal law of the country where the crime is committed.[88] A criminal in

---

84. See ibid.

85. Discussed earlier in this Chapter.

86. Principle IV of the Principles of Nuremberg Charter and Judgment.

87. See Principle III, ibid.; Also see Justice Bernard's objection against the Tokyo Trial, that the Emperor should have been indicted, discussed in Chapter IV.

88. Principle II of the Principles of Nuremberg Charter and Judgment.

international law can not also escape by using the tu quoque argument that others have committed similar crimes. It is admitted that the sins of others can not make the criminals less guilty. In this regard the importance of the war trials lies "not in any claim that they have cleaned the board for themselves, but rather in the pattern they have set."[89] It was also made clear in the war trials that the defendants can no longer use the plea of "lack of knowledge" to avoid criminal liability under international law.[90]

But as discussed earlier, punishment of the guilty persons is not the only desired aim of international criminal

---

89. Stimson, Henry L., "The Nuremberg Trial: Landmark in Law", Foreign Affairs, Vol.25, January 1947, No.2, p.188.

90. In the Doctor's Trial (Karl Brandt and others) conducted by the U.S. Military Tribunal at Nuremberg from 9 December 1946 to 20 August 1947, the Judgment, particularly about Karl Brandt, said, "Occupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps". Similarly, speaking of one of the accused before it, the Tribunal acting in the Pohl Trial said: "Mummenthy's assertions that he did not know what was happening in labour camps and enterprises under his jurisdiction does not exonerate. It was his duty to know". Quoted from Brand, op.cit., p.425. Compare Milch Trial and the High Command Trial discussed in Chapter III, and Roling Judgment discussed in Chapter IV.

law, rather, while safeguarding certain human rights, it also ensures a fair and just trial for the individual defendants. The experience of war trials established the fact that the captured enemy persons should not be dealt without any trial. This has been, moreover, codified and approved by the United Nations in various resolutions.[91] Such trials should be in accordance with the Law of Nations "as the result of the effective provision of practicable measures of impartiality and mutuality".[92]

Subjectal Status of the Individual Recognized

Although the war trials established the fact that the individual is gaining recognition of his inherent and inalienable Natural law rights,[93] particularly in the international penal jurisdiction, it should be admitted that the legal norm of absolute state sovereignty is hampering this

---

91. Principle V of the Principles of Nuremberg Charter and Judgment; Articles 10 and 11 of the Declaration of Human Rights.

92. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", op.cit., p. 59.

93. See Kilmuir, Viscount, "Nuremberg in Retrospect, Presidential Address, 1956, op.cit., pp. 17-18: The Trials have been "a great demonstration of the dynamic of the law. The law was seen by all the world to display justice and dignity in dealing with an unparalleled situation, and to declare and apply principles designed to preserve the safety and comfort of ordinary people, as well as to punish the wrong doer."

entire movement. It cannot be denied, of course, that since these war trials under consideration, in several incidents the principles established by the war trials have been violated.

In the International level, however, significant achievements can be marked. The United Nations, representing the international community, has codified, adopted and approved various principles established by the war trials from time to time,[94] and thereby confirmed the fact that individuals are subjects of international law.

Various suggestions are given to improve the individual status under international law. It is suggested, for instance, that Article 34 of the Statute of the International Court of Justice should be modified so that private persons could litigate.[95] Furthermore, it is suggested that the

---

94. The U.N. approved the Nuremberg Principles (Resolution 95(1), 11 December 1946), codified and approved the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" (Resolution 488(v), 12 December 1950), codified the Draft Code of Offences against the Peace and Security of Mankind", (1954), approved the Universal Declaration of Human Rights (10 December 1948), approved the Genocide Convention (9 December 1948), and approved the Definition of Aggression (1974). Direct participation and representation of the individual has also been encouraged in some of the organs of the U.N., e.g. I.L.O.

95. See for such suggestions, Gormley, op.cit., pp.63-64.

creation of a Permanent International Criminal Court, shall be a great achievement. Despite the fact that this requires a change of attitude mainly for the States, serious attention has been, however, paid by the U.N. General Assembly "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".[96] This process can be accelerated by the United Nations.

Finally, it can be concluded that the war trials has definite impact on the subjectal status of individual in international law; it has opened the international arena for the human beings, the ultimate unit of all law; although the road is tortuous, the horizen is clear.

96./ The General Assembly Resolution 260 B(111) of 9 December 1948, see The Work of the International Law Commission, op.cit., p. 22.

BIBLIOGRAPHY

BOOKS

Akehurst, Michael, A Modern Introduction to International Law, George Allen and Unwin Ltd., London, Minerva Series, 1970.

Anand, R.P., Studies in International Adjudication, Vikas Publications, Delhi, 1969.

Appleman, J.A., Military Tribunals and International Crimes, Indianapolis, 1954.

Bosch, William J., Judgment on Nuremberg: American Attitudes Towards The Major German War-Crime Trials, Chapel Hill, The University of North Carolina Press, 1970.

Brierly, J.L., The Law of Nations, Waldock, 1955.

Briggs, H.W., The Law of Nations, London, 2nd Edn., 1953.

Calvocoressi, Peter, Nuremberg - The Facts, the Law and the Consequences, The Macmillan Company, New York, 1948.

Dinstein, Yoram, The Defense of Obedience to Superior Orders in International Law, Leyden, 1965.

Eagleton, C., The Responsibility of States in International Law, New York, 1928.

Fenwick, Charles G., International Law, 3rd Edn., 1948.

Friedmann, Wolfgang, The Changing Structure of International Law, Columbia University Press, New York, Second Printing, 1966.

Glueck, S., War Criminals - Their Prosecution and Punishment, New York, 1944.

- The Nuremberg Trial and Aggressive War, New York, 1946.

Greenspan, Morris, The Modern Law of Land Warfare, Berkley and Los Angles, University of California Press, 1959.

Hankey, Lord, Politics, Trials and Errors, Oxford, 1950.

Hudson, Manley O., International Tribunals - Past and Future, Carnegie Endowment for International Peace and Brookings Institution, Washington, 1944.

Hyde, C.C., International Law, Boston, 1945.

International Military Tribunal for the Far East - Dissentient Judgment of Justice R.B.Pal, Sanyal and Co., Calcutta, April 1953.

Jessup, Philip C., A Modern Law of Nations-An Introduction, The Macmillan Company, New York, 1950.

Keenan, J.B. and Brown, B.F., Crimes against International Law, Washington, 1950.

Kelsen, Hans, Peace Through Law, Chapel Hill, The University of North Carolina Press, 1944.

- General Theory of Law and State, Harvard University Press, Second Printing, 1946.

- The Law of the United Nations, F.A. Praeger, New York, London, 1950.

Kilmuir, Viscount, Right Hon., Nuremberg in Retrospect, Presidential Address, Published by the Holdsworth Club of the Faculty of Law, University of Birmingham, 1956.

Maugham, Viscount, U.N.O. and War Crimes, John Murray, London, 1951.

McDougal, M. and Feliciano, F., Law and Minimum World Public Order, New Haven, 1961.

Melzer, Yehuda, Concepts of Just War, A.W. Sijthoff, Leyden, 1975.

Moore, J.B., A Digest of International Law, Vol.II, Washington, 1906.

Oppenheim, L., International Law, (Edited by H.Lauterpacht), Vol.I, 8th Edn., 1955; Vol.II, Seventh Edition, 1952.

Schwarzenberger, G., International Law, London (3rd ed.), Vol. I, 1957.

Scott, J.B., Law, the State, and the International Community, New York, Vol.I, 1939.

Starke, J.G., An Introduction to International Law, London, 1947.

Stone, Julius, Legal Controls of International Conflict, London, 1954.

- Aggression and World Order-A Critique of United Nations Theories on Aggression, London, 1958.

Stowell, E.C., International Law, New York, 1931.

Thomas and Thomas, The Concept of Aggression, Dallas, 1972.

Whiteman, Marjorie M., Digest of International Law, Vol.II, 1968.

Woetzel, Robert K., The Nuremberg Trials in International Law, Stevens and Sons Limited, London, 1960.

Wright, Lord, History of the United Nations War Crimes Commission and the Development of the Laws of War, London, 1946.

Wright, Quincy, Human Rights, Maritain ed., n.d., 1950.

ARTICLES

Anderson, C. Arnold, "The Utility of The Proposed Trial and Punishment of Enemy Leaders", American Political Science Review, Vol. 37, 1943.

Aufricht, Hans, "Personality in International Law", American Political Science Review, Vol.XXXVII, No.2, April 1943.

Borchard, E., "The Access of Individuals to International Courts", Proceedings, American Society of International Law, 24, 1930.

Borton, Hugh, "The Allied Occupation of Japan, 1945-7", Survey of International Affairs, 1939-1946, (The Far East 1942-1946), Royal Institute of International Affairs, Oxford.

Brand, G., "The War Crimes Trials and the Laws of War", British Yearbook of International Law, Vol.XXVI, 1949.

Brown, P.M., "The Individual and International Law", American Journal of International Law, Vol.18, 1924.

Cowles, W.B., "The Impact of International Law on the Individual", Proceedings, American Society of International Law, 1952.

Dunn, F.S., "The International Rights of Individuals", Proceedings, American Society of International Law, 1941.

Ehard, H., "The Nuremberg Trial against the Major War Criminals and International Law", American Journal of International Law, Vol.43, 1949.

Ferencz, Benjamin B., "Defining Aggression-Where it Stands and Where it's Going", American Journal of International Law, 1972.

Finch, George A., "The Nuremberg Trial and International Law", American Journal of International Law, Vol. 41, 1947.

Friedmann, Wolfgang, "The Growth of State Control over the Individual and Its Effect upon the Rules of International State Responsibility", British Yearbook of International Law, 19, 1938.

Goodhart, A.L., "The Legality of the Nuremberg Trial", Juridical Review, April 1946.

Gross, L., "The Criminality of Aggressive War", American Political Science Review, 1947.

Hambro, E., "Individuals before International Tribunals", Proceedings, American Society of International Law, 1952.

Henry L. Stimson, "The Nuremberg Trial: Landmark in Law", Foreign Affairs, Vol. 25, No.2, January 1947.

Hoover, Glenn E., "The Outlook For 'War Guilt' Trials", Political Science Quarterly, Vol.LIX, 59(March,1944).

Horwitz, Solis, "The Tokyo Trial", International Conciliation, No. 463, September 1950.

Jackson, Robert H., "Report to the International Conference on Military Trials", (Jackson Report), Washington, 1949, U.S. State Department, 3080.

Jackson, W.E., "Putting the Nuremberg Law to Work", Foreign Affairs, 25 July 1947.

Jenks, Wilfred, C., "The Scope of International Law", British Yearbook of International Law, Vol.XXXI,1954.

Jessup, Philip C., "Force Under a Modern Law of Nations", Foreign Affairs, Index Vol. 25 (Nos.1-4),October 1946 - July 1947, New York.

Kelsen, Hans, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" International and Comparative Law Quarterly,Vol.1, No. 2, Summer 1947.

-"Collective and Individual Responsibility for Acts of States in International Law", Jewish Yearbook International Law, 1948.

Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes", British Yearbook of International Law, Vol. XXI, 1944.

- "The Subjects of the Law of Nations", Law Quarterly Review, Vol. 63, 1947.

Manner, George, "The Object Theory of the Individual in International Law", American Journal of International Law, Vol. 46, 1952.

O'Brien, William V., "The Meaning of Military Necessity in International Law", World Politics, Vol.1,1948.

Schick, F.B., "The Nuremberg Trial and The International Law of the Future", American Journal of International Law, Vol. 41, 1947.

Schwelb, E., "Crimes against Humanity", British Yearbook of International Law, Vol. XXIII, 1946.

Svarlien, O., "International Law and the Individual", Journal of Public Law, Vol.4, 1955.

Taylor, Telford, "The Nuremberg War Crimes Trials", International Conciliation, No. 450, April 1949,

- "The Nuremberg War Crimes Trials - An Appraisal", Proceedings of the Academy of Political Science, Vol. XXII (1948-1950), New York, 1950.

Wright, Lord, "War Crimes under International Law", Law Quarterly Review, Vol. 62, 1946.

Wright, Quincy, "War Criminals", American Journal of International Law, (Supplement), Vol. 39, 1945.

- "The Law of the Nuremberg Trial", American Journal of International Law, Vol. 41, 1947.

JOURNALS, YEARBOOKS, REPORTS ETC.

History of the United Nations War Crimes Commission and the Development of the Laws of War, His Majesty's Stationery Office, London, 1948.

International Law Reports, (Ed. E. Lauterpacht), London, 1964.

Journals - American Journal of International Law,
- American Political Science Review,
- British Yearbook of International Law,
- Foreign Affairs (An American Quarterly Review),
- International and Comparative Law Quarterly,
- International Conciliation,
- Jewish Yearbook of International Law,
- Journal of Public Law,
- Juridical Review,
- Law Quarterly Review,
- Political Science Quarterly,
- Proceedings, American Society of International Law,
- Survey of International Affairs,
- World Politics

Office of Military Government for Germany (U.S.), Report of the Military Governor, Legal and Judicial Affairs, 1 September 1947 - 31 August 1948.

Publications of the League of Nations, Legal, 1927, Vol.9, American Journal of International Law, (Supplement), 1928.

Report of the Deputy Judge Advocate for War Crimes, European Command, Legal and Judicial Affairs, June 1944 - July 1948.

Report of the Special Committee on the Question of Defining Aggression, 11 March - 12 April 1974. General Assembly Official Records, 29th Session, Supplement, No.19 (A/9619), United Nations.

The Far East 1942-1946, Survey of International Affairs, 1939-1946, Royal Institute of International Affairs, Oxford.

The Work of The International Law Commission, Revised Edition, Office of Public Information, United Nations, New York, 1972.

Trial of The Major War Criminals before the International Military Tribunal, Nuremberg, Vol. 1, 1947; Vol. XXII, 1948.

Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Washington, 1950 (15 vols.)

United Nations General Assembly, Official Records, Third Session (1), Doc. A/810, U.N. Publications, Sales No. 1949, 1.3.

U.N. Security Council, Official Records, 15th Year, Supplement, April, May and June 1960.

U.S. - Department of State Bulletin.
- State Department.
- Department of State Publication.